

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. **76-4184**

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.

and

NORMAN SCOTT,

Petitioners,

vs.

SMITHSONIAN INSTITUTION, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioners Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 28, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (Appendix A) as does the opinion rendered by the United States District Court for the District of Columbia (Appendix B). This action had previously been before the Court of Appeals on a procedural matter. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute* (sic), 163 U.S. App. D.C. 140, 500 F.2d 808 (1974).

JURISDICTION

The District Court had jurisdiction under D.C. Code §11-521, 1967 ed. (amount in controversy exceeds \$50,000.00, prior to Court Reorganization Act of 1970) and 28 U.S.C. §1332. The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 28, 1976, and this petition for writ of certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Does the Federal Tort Claims Act, 28 U.S.C. §1346(b) and 2671, *et seq.*, confer sovereign immunity upon an entity previously suable in tort and if not, has the Smithsonian Institution elsewhere been conferred by Congress with immunity from suit?

STATUTES INVOLVED

20 U.S.C. §41. *Incorporation of Institution.*

The President, the Vice-President, the Chief Justice, and the heads of executive departments are hereby constituted

an establishment by the name of the Smithsonian Institution for the increase and diffusion of knowledge among men, and by that name shall be known and have perpetual succession with the powers, limitations, and restrictions hereinafter contained, and no other.

28 U.S.C. §1346. *United States as Defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims:

....

(b) Subject to the provisions of Chapter 171 of this title [§§2671-2680 of this title], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2671. *Definitions.*

As used in this chapter [§§2671-2680 of this title] and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty. (June 25, 1948, c. 646, §1, 62 Stat. 982; May 24, 1969, c. 139, §124, 63 Stat. 106; July 18, 1966, P.L. 89-506, §8, 80 Stat. 307.)

28 U.S.C. §2679. Exclusiveness of remedy.

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive. . . .

28 U.S.C. §2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to —

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute, or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives. (June 25, 1948, c. 646, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§2(a)(2), 13(5), 64 Stat. 1038, 1043; August 18, 1959, P.L. 86-168, Title II, §202(b), 73 Stat. 389.)

STATEMENT OF THE CASE

On March 6, 1970, Alicia Dussan de Reichel, a Professor in Bogota, Colombia, sent a handwritten personal letter to Betty Meggers, wife of Defendant Clifford Evans, Chairman of the Department of Anthropology of the National Museum of Natural History of the Smithsonian Institution, indicating that Plaintiffs Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott, were being enthusiastically considered by the Institute Colombiano de Anthropologia to engage in underwater archeological explorations in Colombia. The letter further indicated Professor Dussan's personal dislike for this proposition and requested a return letter, not referring to her request, from Defendant Evans and Dr. Meggers in support of her position. Apparently without researching the matter, Dr. Evans immediately responded as requested, on Smithsonian stationary, signing as "Chairman, Department of Anthropology, National Museum of Natural History." The letter dated March 11, 1970, and addressed to Professor Dussan, states as follows:

"... I made an individual inquiry and I am bringing this matter to your immediate attention so that Colombia and especially the Institute does not get involved in an unscientific venture.

This organization (Expeditions) is without scientific competence in the field of archeology. They are purely treasure hunters that have no scientific

staff trained in archeology and they have been in several unfavorable situations in Florida that have caused the name of the company to be changed several times to avoid litigation. They have no valid reason to conduct this expedition in Colombia and it would be a scientific disgrace if the Institute gave permission to an unscientific organization of this nature for it would cause international problems and affect the image of the Institute and damage its reputation which now is so high. Since you are in a position now as Director of the Museums, I feel I should write you at once so that you could take whatever action possible with any of your supervisors, government officials, and embassy people to prevent this disgraceful expedition that is going on under the guise of science.

I am sending a carbon of this letter to my good friend, Mr. Andy Wilkison, Cultural Affairs Officer, U.S. Embassy, Bogota, Colombia, and alert him on the severity of this problem. He is an old friend of ours, international science, and the Smithsonian Institution and will do everything to see that the good international relationships continue between Colombia and the U.S. Please call him and see what he can do at international level to prevent this organization from operating in Colombia, if it cannot be stopped otherwise."

On January 8, 1971, petitioners, Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott, filed this libel action against Clifford Evans based upon the libelous portions of the above letter and against the Smithsonian Institution and its Regents based upon their knowledge, consent and ratification of Evans' actions. The Smithsonian

has not denied the scope of Evans' employment or its ratification of his actions. No claim arising out of the Federal Tort Claims Act, 28 U.S.C. §1346(b), 2671, *et seq.*, was advanced.

On January 17, 1972, the District court granted summary judgment in favor of all defendants, holding that the "Smithsonian Institution is an establishment of the United States and a Federal Agency within the meaning of the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, which by §2680 was expressly excepted from being sued for libel. . . ." On December 19, 1972, plaintiffs' motion to vacate the entry of judgment on the grounds of lack of notice was denied. The Court of Appeals reversed on June 26, 1974. On July 31, 1974, the order of summary judgment was vacated and re-entered.

Appeal from the entry of summary judgment was taken and on June 28, 1976, the United States Court of Appeals for the District of Columbia Circuit reversed in part and affirmed in part, holding, *inter alia*, that the Smithsonian Institution was granted sovereign immunity by 28 U.S.C. §2680(h).

REASONS FOR GRANTING THE WRIT

I. TO RESOLVE CONFLICT BETWEEN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND OTHER FEDERAL CIRCUITS AND LOWER FEDERAL COURTS

The decision of the United States Court of Appeals for the District of Columbia Circuit should be reviewed because it is in direct conflict with appellate decisions in several other circuits and with District Court decisions in further circuits. *Baker v. F&F Investment Co.*, 489 F.2d 829 (7th

Cir. 1973); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971); *Brewer v. Sheco Construction Co.*, 327 F. Supp. 1017 (W.D. Ky. 1971); *Latch v. Tennessee Valley Authority*, 312 F. Supp. 1069 (N.D. Miss. 1970); *De Scala v. Panama Canal Co.*, 222 F. Supp. 931 (S.D.N.Y. 1963).

In the instant action, the Court of Appeals rejected the argument that the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671, *et seq.* (hereinafter "F.T.C.A."), operated only as a select waiver of pre-existing sovereign immunity, and held that the Act in fact conferred immunity upon certain entities, including the Smithsonian Institution. Specifically, the Court of Appeals held that 28 U.S.C. §2680(h), which expressly excepted libel actions from the scope of the F.T.C.A. in fact conferred immunity in libel actions where none had existed before.

In *Baker v. F&F Investment Co.*, 489 F.2d 829, 834-836 (7th Cir. 1973), the Seventh Circuit upheld the District Court's refusal to dismiss a tort action against several federal agencies, holding that in suits within the purview of the exceptions listed by 28 U.S.C. §2680, the F.T.C.A. does not apply, and the immunity issue must be resolved by pre-F.T.C.A. common law immunity scrutiny. The Court emphasized that the United States, itself, could not be sued because the exception to the waiver of immunity of the F.T.C.A. continued the United States' pre-existing immunity, but that with respect to named agencies, pre-F.T.C.A. suability status was unaffected by the F.T.C.A. for actions enumerated in §2680.

A similar result was reached in the Fifth Circuit. In *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140 (5th Cir. 1971), the Fifth Circuit held that a plaintiff may bring an action against the United States under

the Suits in Admiralty Act, based upon negligent misrepresentation, even though negligent misrepresentation is excepted from the F.T.C.A. by §2680(h). The decision recognizes that the F.T.C.A. did not confer immunity even on the United States, itself, in situations where it was previously suable, and that for actions cognizable under §2680(h), Courts must look elsewhere to determine the question of suability.

Several District Courts have reached the same conclusion concerning other portions of §2680. In *Brewer v. Sheco Construction Co.*, 327 F. Supp. 1017 (W.D. Ky. 1971), the District Court held that the F.T.C.A. did not apply to suits against the Tennessee Valley Authority, per the parallel exception clause, 28 U.S.C. §2680(1), and that the susceptibility of the T.V.A. to suit would revert to pre-F.T.C.A. law. The decision of the Court of Appeals in the instant case is in conflict with *Brewer* in that *Brewer* deems certain exceptions to the F.T.C.A. to preserve the status quo, while the instant case holds that others, derived from the same section, actively confer immunity.

In *Latch v. Tennessee Valley Authority*, 312 F. Supp. 1069 (N.D. Miss. 1970), the District Court held that, while an action enumerated under §2680(1) cannot be brought under §1346(b) of the F.T.C.A., it may be brought under other jurisdictional statutes. The Court further held that the F.T.C.A. waiver of immunity left untouched the defendant's pre-existing suability.

In *De Scala v. Panama Canal Co.*, 222 F. Supp. 931, 934 (S.D.N.Y. 1963), the District Court held that §2680 (m) neither conferred nor intended to confer immunity on the Panama Canal Company, but, in fact, continued its pre-existing suability. See also, *Gardner v. Panama Railroad Co.*, 342 U.S. 29 (1951) (dictum).

The Court of Appeals' decision in the instant case finds support in several cases, although none except the instant case directly confronts the language of §2680 that "The provisions of this chapter and section 1346(b) of this title *shall not apply* to . . ." (emphasis added). (See Slip Op. at 9). The issue of whether the F.T.C.A. in fact conferred immunity upon entities such as the Smithsonian therefore presently rests squarely in a state of limbo, the result dependent solely upon which circuit hears the action.

II. TO DECIDE AN IMPORTANT FEDERAL QUESTION

The question of whether the F.T.C.A. confers immunity upon any agency or establishment or merely waives portions of pre-existing immunity is an important federal question which has not heretofore been decided by this Court.

Congress' purpose in enacting the F.T.C.A. was twofold. First, in order to avoid injustice to those having meritorious claims against the sovereign and to eliminate the burden in Congress of investigating and passing private bills seeking individual relief, the F.T.C.A. waived some of the immunity which had existed previously as to certain types of actions. *United States v. Muniz*, 374 U.S. 150, 154 (1963); *Feres v. United States*, 340 U.S. 135, 141 (1950); *Baker v. F&F Investment Co.*, 489 F.2d 829, 835 (7th Cir. 1973). Second, it provided that the United States would answer in its own name for those acts covered by the waiver even though the acts were performed by employees of a federal agency. 28 U.S.C. §2674; *Feres v. United States*, 340 U.S. 135, 141 (1950); *Brewer v. Sheco Construction Co.*, 327 F. Supp. 1017 (W.D. Ky. 1971).

The Court of Appeals in this action engrafts a new purpose of the F.T.C.A. — to actively create immunity for

previously suable entities. This alleged purpose is completely contrary to the prior recognized intent of the F.T.C.A. of waiver of immunity. This shift in policy can do nothing but throw the body of law arising under the F.T.C.A. into a state of disarray.

The effect of the Court of Appeals' unique view of the purpose of the F.T.C.A. when coupled with the peculiar character of the Smithsonian Institution raises further doubt as to whether the Smithsonian should enjoy absolute immunity from suit. The Court of Appeals recognizes that "the Smithsonian has a substantial private dimension. . . ." (Slip op. at 3). In fact, the Smithsonian Institution began with a completely private bequest of James Smithson in 1829. *General Hearings Before the Subcommittee on Library and Memorials*, 91st Cong., 2d Sess., 16 (1970). Congress determined in 1846 that the Federal government did not have the authority to administer the trust directly, and the bequest was lent to the United States Treasury, earning 6 per cent interest in perpetuity. *Id.* Its origin indicates that the Smithsonian was not so intricately involved with the sovereign itself as to share in the United States' blanket of immunity. The actual operation of the Smithsonian during its first century lead this Court to comment in 1939 as follows:

"It is noteworthy that the oldest surviving government corporation — The Smithsonian Institution — has several times been in the law courts, even in the absence of explicit authority and although the general feeling regarding governmental immunity was very different in 1846 from what it has become in our own day. 9 Stat. 102, *Smithsonian Institution v. Meech*, 169 U.S. 398; *Smithsonian Institution v. St. John*, 214 U.S. 19.

Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 391-92 (1939).

Since its overwhelmingly private origin, the Smithsonian has branched into many fields previously occupied by the private sector. See *General Hearings Before the Subcommittee on Library and Memorials*, *supra*. In discussing the issue of immunity of Defendant Evans, the Court of Appeals noted that:

"In this era of government grown far beyond any limits envisioned even at the beginning of this century, the Supreme Court's functional approach to immunity doctrine makes it entirely appropriate to recognize that many of the areas government has entered involve operations nearly undistinguishable from private endeavors, having only the most marginal effect on matters usually identified with the public sector." (Slip op. at 29).

In light of this recognition that government in general, and the Smithsonian, specifically, has grown to encompass fields of endeavor not traditionally associated with those crucial activities which must be protected at all costs by an impenetrable blanket of immunity, rigid application of immunity and the view that Congress intended by the F.T.C.A. to confer full immunity on entities not previously within its shield are contrary to settled and basic concepts of law. See *R.F.C. v. Menihan Corp.*, 312 U.S. 81, 84 (1941); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940); *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 388-389 (1939).

It should also be noted that the Smithsonian continues to the present day to protect its status as a private institution. On the same day this action was filed, another

action was filed by Plaintiff's predecessor corporation against the Smithsonian Institution in the United States District Court for the District of Columbia. (Civil Action No. 55-71). The dispute concerned a contract between the parties for archeological work on the U.S.S. Tecumseh. Therein the Smithsonian actively protected its capacity as a private institution. Had that action, which was substantially in excess of \$10,000.00, been deemed one against the United States, the District Court would have had no jurisdiction. 28 U.S.C. §1346(a)(2). The action could only have been brought in the Court of Claims. 28 U.S.C. §1491. In addition, a jury trial is not permitted in an action against the United States under 28 U.S.C. §1346(a)(2). 28 U.S.C. §2402. However, the Smithsonian raised neither of these substantial points and the case was tried before a jury in the United States District Court. It appears therefore that the Smithsonian is attempting to adopt a chameleon-skin cloak under which it may alter its character in order to assume a new status whenever it may appear beneficial.

The suability status of inherently private entities and the effect of the F.T.C.A. therefore present an important question of federal law which should be determined by this Court.

III. DECISION IGNORES PLAIN LANGUAGE OF ACT AND IS CONTRARY TO ITS EXPRESS PURPOSE

The plain language of 28 U.S.C. §2680(h) states that:

The provisions of this Chapter (Chapter 171, 28 U.S.C. §2671 et seq.) and Section 1346(h) of this title shall not apply to . . .

(h) any claim arising out of libel.

Congress could not have made it clearer that the F.T.C.A. in its entirety does not apply in actions for libel. While the Court of Appeals recognizes the meaning of Section 2680(h), it defers to several prior opinions, commenting, "the courts' consistent sense of legislative intention is impressive even though the decisions fail to acknowledge the difficulty presented by the literal text." (Slip op. at 9). The Court further admits being influenced by the fact that perplexing questions as to the state of the common law would result from a literal reading of the F.T.C.A., with few, if any, differences in result. (Slip op. at 10). Because of the inherently private nature of the Smithsonian, the instant case is one in which the result would differ. Difficulty in application of the F.T.C.A. is an invalid reason to reject its plain and express language.

Had Congress intended to confer immunity by the F.T.C.A., it could have done so merely by stating that there shall be immunity for the exceptions listed in Section 2680. Its failure to do so strongly indicates its intent to continue the suability status which existed prior to the F.T.C.A. for entities sued upon claims listed in Section 2680.

In order to determine the suability of such an entity, it is, thus, necessary to consult relevant caselaw. A review of the law on immunity makes it abundantly clear that the Smithsonian Institution is not "so vital to some overriding public interest that it must be immunized from the possibility of civil accountability." *Lasher v. Shafer*, 460 F.2d 343, 348 (3d Cir. 1972). See *R.F.C. v. Menihan Corp.*, 312 U.S. 81, 84 (1941); *United States v. Shaw*, 309 U.S. 485, 501 (1940); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940); *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 388-89 (1939); *Sloan Shipyards v. United States Fleet Corp.*, 258 U.S. 549, 566-67 (1922).

As this action enjoys a jurisdictional basis independent of 28 U.S.C. §1346(b), and the F.T.C.A. expressly does not apply to actions for libel, the Smithsonian cannot use the F.T.C.A. as a basis for a defense of immunity.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1899

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.,
A CORPORATION, APPELLANT
NORMAN SCOTT

v.

SMITHSONIAN INSTITUTION, ET AL

Appeal from the United States District Court for the
District of Columbia
(D.C. Civil Action 54-71)

Argued 18 September 1975

Decided 28 June 1976

John J. Pyne, for appellant.

Jeffrey T. Demerath, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney and *John A. Terry* and *Suzanne D. Murphy*, Assistant United States Attorneys, were on the brief for appellee.

Before: LEVENTHAL and WILKEY, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

Opinion for the Court filed by *Circuit Judge WILKEY*.

Opinion concurring and dissenting in part filed by *Circuit Judge LEVENTHAL*.

WILKEY, *Circuit Judge*: This case comes before us on appeal from an order of summary judgment entered 31 July 1974,¹ in an action for libel brought by petitioners against the Smithsonian Institution and its Regents, and against Clifford Evans, Chairman of the Department of Anthropology at the Museum of Natural History. The claim arose out of a letter written by Evans, in which he expressed views as to the capabilities of petitioner Expeditions Unlimited in the field of underwater archaeological excavation. The merits of the libel claim are not presently before us, since summary judgment for defendants was granted on the grounds of Smithsonian's governmental immunity and Evans' absolute privilege in making statements within the scope of his duties as a government employee.

I. IMMUNITY OF THE SMITHSONIAN INSTITUTION

The holding of the district court that the Smithsonian Institution may not be sued for libel is affirmed. That conclusion rests upon our reading of the Federal Tort Claims Act. Because we find that the Tort Claims Act should be read as granting federal agencies immunity from suit for libel, we do not reach the issue of the Institution's immunity status at common law.

In finding immunity under the Act, the initial step is to determine whether the defendant organization is a

* Sitting by designation pursuant to 28 U.S.C. § 294(d)

¹ App. at 6-8

"federal agency" within the definition set forth in the statute.² Although the Smithsonian has a substantial private dimension,³ we conclude that the nature of its function as a national museum and center of scholarship, coupled with the substantial governmental role in funding⁴ and oversight,⁵ make the institution an "independent establishment of the United States," within the "federal agency" definition.⁶

² 28 U.S.C. § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

* * * * *

³ The Smithsonian has private endowment funds which in 1970 totalled \$33 million. *General Hearings Before the Sub-Committee on Library and Memorials*, 91st Cong., 2d Sess., 323 (1970). (hereinafter *Hearings*). In that year over \$15 million of private money went toward operations of the Institution, and almost one-third of the employees were non-federal. *Id.* at 253.

⁴ Approximately 75% of the Institution's operating funds come from federal appropriations. *Hearings*, *supra* note 3, at 253, 321.

⁵ Eight of the seventeen Regents of the Institution acquire their positions by virtue of holding other high positions in the federal government. 20 U.S.C. § 42 (1970). The remaining Regents are appointed by joint resolution of Congress. 20 U.S.C. § 43 (1970). The Institution is audited periodically by the General Accounting Office. *See Hearings*, *supra* note 3, at 362-97.

⁶ 28 U.S.C. § 2671 (1970). While there is no outstanding stock of the Smithsonian, it has more in common with the "mixed ownership government corporations," 31 U.S.C. § 856 (1970), like the F.D.I.C., which have been found to be "fed-

Section 1346(b) of Title 28, U.S.C., creates, subject to the provisions of 28 U.S.C. §§ 2671-80, a remedy against the United States for injuries wrongfully caused by any "employee of the government."⁷ Because the Smithsonian is a federal agency, its employees are employees of the government," and the § 1346(b) action thus may lie.⁸ Under 28 U.S.C. § 2679(a), the § 1346(b) remedy is made exclusive in cases where that section applies, even where an agency may elsewhere be authorized to sue and be sued in its own right.⁹ However, under 28 U.S.C. § 2680(h), the provisions of the Tort Claims Act, including the jurisdictional provision, § 1346(b), are made inapplicable to libel actions, such as the one presently before us.¹⁰ The difficult interpretive prob-

eral agencies," *Davis v. F.D.I.C.*, 369 F.Supp. 277, 279 (D. Colo. 1974); *Freeling v. F.D.I.C.*, 221 F.Supp. 955, 955-56, (W.D. Okla. 1962), than with corporations whose only significant governmental contact is a federal charter. *Pearl v. United States*, 230 F.2d 243, 245 (10th Cir. 1956) (Civil Air Patrol held not a federal agency). The substantial federal funding and the important supervisory role played by governmental officials are the most important factors linking it to the government. Cf. *United States v. Orleans*, 44 U.S.L.W. 4700 (1 June 1976); *Logue v. United States*, 412 U.S. 521 (1973).

⁷ 28 U.S.C. § 1346(b) (1970).

⁸ 28 U.S.C. § 2671 (1970).

⁹ 28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

¹⁰ 28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

• • • • •

[Continued]

lem posed by this case is to determine the effect of this exceptions clause.

On the one hand, the exceptions clause might be viewed as making the Tort Claims Act entirely inapplicable to libel actions, in which event the common law immunity status of a defendant would govern, and an action might be possible if independent jurisdictional grounds could be found. On the other hand, § 2680(h) could be seen as imposing a bar to suit, if the Tort Claims Act is regarded as a systematic statute governing all tort claims, with the exceptions clauses setting forth the areas where suit is to be barred.

There are significant arguments to be made in favor of the first view. The language of the exceptions section makes no reference to any creation or, more properly, continuation of long established governmental immunity in the categories of cases it sets forth. Rather, the exceptions section only states that the provisions of the Tort Claims Act "shall not apply."¹¹ It would not be illogical to conclude that, in these categories of cases, the Act neither creates nor removes immunity but leaves the question of suability as it was before the Act, to be determined by other statutes and by common law rules. This interpretation is further bolstered by the construc-

¹⁰ [Continued]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentations, deceit, or interference with contract rights.

¹¹ There is not only the language of § 2680, the exceptions section, but its interrelation with § 1346(b), the jurisdictional section. The section entitled "Exceptions" begins: "The provisions of . . . section 1346(b) of this title shall not apply to . . . (h) Any claim arising out of . . . libel, slander . . ." If the section conferring jurisdiction simply does "not apply," can the Tort Claims Act have any relationship to an action for libel? We conclude that it does, but the answer appears by no means as simple as has been assumed.

tior which has been given to § 2680(1) and (m), which except the Tennessee Valley Authority and the Panama Canal Company from the Act's provisions. These parallel provisions to the libel exception (h) have consistently been held not to create any immunity, but to allow suit to be brought against the organizations just as before the Act, under separate statutory authorizations.¹²

While logic and a consistent reading of the statute would, by themselves, thus lead us outside the Act at the very start, to inquire as to the Smithsonian's common law immunity status and as to other possible bases of jurisdiction, other factors cause us to reject this approach. Legislative history, the great weight of judicial precedent, and a desire to facilitate future application of the Act, convince us that § 2680(h) should be read as an affirmative grant of immunity to "federal agencies" in the types of deliberate tort cases which it describes.

We conclude from the structure of the Tort Claims Act, and from the legislative reports accompanying its passage, that Congress probably did not intend to leave unaffected by the Act the categories of suits excepted by § 2680(h). While primarily seeking to expand governmental liability for torts, it appears to us that Congress also sought to systematize and centralize the immunity laws.¹³ One evidence of this appears in § 2679(a) of the

¹² *Gardner v. Panama R.R.*, 342 U.S. 29, 31 (1951) (dictum); *Brewer v. Sheco Construction Co.*, 327 F.Supp. 1017, 1018-19 (W.D. Ky. 1971); *Latch v. T.V.A.*, 312 F.Supp. 1069, 1071-72 (N.D. Miss. 1970); *De Scala v. Panama Canal Co.*, 222 F.Supp. 931, 934 (S.D.N.Y. 1963). The Congressional reports accompanying the Act explicitly indicate that some of the exceptions were included because "adequate remedies were already available." H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); S.Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946).

¹³ See *Wickman v. Inland Waterways Corp.*, 78 F.Supp. 284, 286 (D. Minn. 1948).

statute, which in essence renders ineffective any other laws allowing suit or creating remedies against an agency, where the actions "are cognizable under section 1346(b)." "Another evidence of this centralizing impulse appears in the context of exceptions clause § 2680 (a)." This section sets forth the category of discretionary activity, for which immunity has traditionally been granted. That Congress bothered to include it in the exceptions section is consistent with the view that it meant to embody, within § 2680 all of the instances in which immunity is to exist under the statute. It seems to us an unreasonable conclusion, at least in the instances of exceptions (a) and (h), that Congress intended for courts to go beyond the Act, and inquire into common law immunity status and alternative jurisdictional grounds.

¹⁴ 28 U.S.C. § 2679(a) (1970). The exception clauses dealing with the T.V.A. and the Panama Canal Company, 28 U.S.C. § 2680 (l) and (m) (1970), were clearly not intended to bar suit under separate authorizing statutes, see note 12 *supra*, and thus these clauses weaken somewhat the argument that the Act was intended to centralize all laws concerning federal governmental immunity. However, the uniqueness of these organizations, coupled with the fact that their amenability to suit was well established at the time the exceptions were adopted, lead us to conclude that we are not bound by rigid parallelism to clauses (l) and (m) in our construction of clause (h).

¹⁵ 28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

More affirmative, though still ambiguous, evidence that Congress saw itself as pre-empting the common law of immunity appears in the reports which accompanied the bill through the House and Senate. In discussing the exclusivity provision,¹⁶ the reports of both chambers make the following statement:¹⁷

This will place torts of "suable" agencies of the United States upon precisely the same footing as torts of "nonsuable" agencies. In both cases, the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act, as, for example, the suits in Admiralty Act. It is intended that neither corporate status nor "sue and be sued" clauses shall, alone, be the basis for suits for money recovery sounding in tort.

From these statements may be inferred a general intent to treat all federal agencies alike as regards immunity, irrespective of what their immunity status was at common law.¹⁸ We find it likely that Congress conceived of

¹⁶ Now 28 U.S.C. § 2679(a) (1970).

¹⁷ H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess., 33-34 (1946) (emphasis added).

¹⁸ However, this inference is not compelled by the actual language of the reports. The reports' statement, that suability clauses in agency charters do not affect the applicability of the Tort Claims Act, would not be in conflict with a view that common law immunity doctrine governs in cases thrown outside the Act by the language of the exceptions clause. Nor would the statement that corporate status alone is not a basis for suit, be in conflict with a conclusion that the Smithsonian may have no operative immunity arising from common law, in light of its corporate status and its unique mix of private and governmental operations, funding, and management. The language about the exception clauses either preventing re-

itself as codifying the immunity law, and eliminating any necessity to look at the common law, once it is concluded that the defendant is a federal agency within the definition of the Act.

We might perhaps take a different view of legislative intent if this were a matter of first impression. But we give weight to the fact that since the time of enactment, it has been the consistent practice of the federal courts to read both exceptions (a) and (h) as defining grants of immunity to "federal agencies."¹⁹ The courts' consistent sense of legislative intention is impressive even though the decisions fail to acknowledge the difficulty presented by the literal text.²⁰

covery or leaving recovery to another Act also presents no inconsistency, since even if a court were to find operative common law immunity, a jurisdictional statute ("some other act") apart from the Act's § 1346(b) would have to be found for any suit to be entertained, at least in federal court.

¹⁹ *Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345 (D.C. Cir.), cert. denied, 366 U.S. 910 (1961); *United States v. Delta Indus. Inc.*, 275 F.Supp. 934, 936-37 (N.D. Ohio 1966); *James v. F.D.I.C.*, 231 F.Supp. 475, 477 (W.D. La. 1964); *Freeling v. F.D.I.C.*, 221 F.Supp. 955, 956-57 (W.D. Okla. 1962).

²⁰ In *Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 346 (D.C. Cir. 1961) the court asserts that libel claims "are cognizable under section 1346(b)" within the meaning of the exclusiveness of remedy provision, § 2679(a), even though the exceptions clause of § 2680(h) flatly states that the provisions of § 1346(b) "shall not apply to" libel. Cf. *Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 946 (D.C. Cir. 1975), where the court observed, "If the claim falls outside the Act completely or within one of the exceptions-to-liability embodied in the statute, . . ." without finding it necessary to explain how the claim for negligent misrepresentation might "fall outside the Act completely."

We are also influenced, we must confess, by the consideration that a contrary reading of the statute would lead to perplexing questions as to the state of the common law, while not leading to a clear change of result in any imaginable case. For there to be any difference in result, the defendant would have to be within the "federal agency" definition of § 2674, and yet be sufficiently private as to lead to the inference that Congress, in creating the organization, intended not to render it immune.²¹ Were both of these conditions met, it would be necessary, further, that the subject matter of the suit be within one of the clauses of § 2680 which are presently construed to confer immunity.

We cannot envisage that more than a few, if any, cases would meet all of these requirements, and thus be decided differently under a literal reading of the Act. Yet to determine whether it might be applicable would require the courts in a considerable array of cases to make a complex and speculative inquiry into common law immunity status.²² We think the legislature intended the courts to decide suability questions by direct reference to the statute rather than by pursuit of the will-o'-the-wisp of the prior law. We conclude that exception clause (h) should continue to be read as defining the

²¹ For discussions of how immunity status would be determined at common law, see *R.F.C. v. Menihan Corp.*, 312 U.S. 81, 84 (1941); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940); *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 389 (1939).

²² Case law indicates that the inquiry as to common law immunity must focus on whether Congress intended to confer immunity at the time the organization was created. See cases cited, note 21 *supra*. Yet it appears unlikely that any directly expressed Congressional intent could ever be found in the instance of a federal agency created after the passage of the Tort Claims Act, since Congress almost certainly gave no consideration to the immunity issue, but deferred instead to the framework of the Act.

existence of immunity in suits involving deliberate torts, and that the summary judgment in favor of Smithsonian should be affirmed.

II. PERSONAL IMMUNITY OF DEFENDANT EVANS

A separate and distinct issue is raised on appeal, by the district court's conclusion that defendant Evans is personally immune from suit under an absolute privilege of federal officials to make statements within the outer perimeter of their duties.²³ We conclude that this question involves considerations not touched upon in Judge Waddy's brief order of summary judgment, and therefore we reverse and remand for further deliberations by the district court. As a guide in those deliberations we offer the following overview of personal governmental immunity doctrine, which is an attempt to integrate the now numerous Supreme Court decisions applying the doctrine in various contexts.

Most basically, the personal immunity question which we remand to the district court requires what ultimately may be a two-step inquiry. First, the court must determine whether Petitioner's statements qualify for the absolute immunity which clearly does apply to at least some actions of some executive officials. Second, should it find the absolute immunity inapplicable, the court must decide whether the statements are nonetheless protected under a variable qualified immunity, which is generally available to officials of the executive branch of government.²⁴

²³ See Order of Summary Judgment, 31 July 1974, *App.* at 6-8.

²⁴ . . . [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the

A. Absolute or Qualified Immunity

1. The Choice—A Balance of Governmental and Private Interests

In order to resolve the threshold question of absolute immunity, we must first decide how the choice between qualified and absolute immunity is to be made. In the area of personal immunity for members of the executive branch, quite unlike the matter of sovereign immunity for the government itself, there is no time-honored common law legacy to guide us.²⁵ Rather, the choice between

existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

²⁵ While the Supreme Court in the nineteenth century more than once dealt with the problem of official immunity for executive officials, see *Apton v. Wilson*, 506 F.2d 83, 90-91 (D.C. Cir. 1974), no clear doctrine of general applicability was established. The seminal case in recent times is *Barr v. Matteo*, 360 U.S. 564 (1959), where the Supreme Court for the first time found absolute immunity in an official of sub-cabinet rank. In his dissent in that case, Mr. Justice Brennan noted that the Court was writing on "almost a clean slate." *Id.* at 586. See also Warren, C. J., dissenting. *Id.* According to Prosser, the doctrine of absolute privilege for certain executive officials originated in 1895. W. PROSSER, *THE LAW OF TORTS* 782 (4th ed. 1971).

With respect to common law background, it is also important to distinguish the immunity of executive officials from that of members of the legislative and judicial branches. For while absolute immunity for any members of the executive is a fairly recent development, it is a principle of several hundred years standing that both legislators and judges are absolutely immune from suit for acts committed in the course of their duties. See *Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347-49 (1872).

absolute and qualified personal immunity must be made on the basis of a relatively few, fairly recent judicial opinions, most of them by the Supreme Court.²⁶

As a matter of speculation, the line between absolute and qualified immunity for executive officials could conceivably be drawn in any number of ways. It might be defined quite mechanically, to immunize absolutely any action by anyone employed by the executive branch. Or, at the other extreme, it might be restricted to a few actions at the highest and most essential levels of government—actions dealing with matters so vital to the security of the nation that no judicial questioning can be tolerated. Common sense and longstanding precedent²⁷ indicate that the governing principle in choosing among these extremes, and all the alternatives lying in between, must be a balance of the affected interest in uninhibited government action versus the concern for individual litigant rights.

²⁶ We are not unaware that numerous cases in the courts of appeals, many in our own court, have dealt with the problem of official immunity for executive officials. *E.g.*, *Doe v. McMillan*, 459 F.2d 1304 (D.C. Cir. 1972), *aff'd and rev'd in part*, 412 U.S. 306 (1973); *David v. Cohen*, 407 F.2d 1268 (D.C. Cir. 1969); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Cooper v. O'Connor*, 99 F.2d 135 (D.C. Cir.), *cert. denied*, 305 U.S. 673 (1938); *Lang v. Wood*, 92 F.2d 211 (D.C. Cir.), *cert. denied*, 302 U.S. 686 (1937); *Smith v. O'Brien*, 88 F.2d 769 (D.C. Cir. 1937); *Standard Nut Margarine Co. v. Mellon*, 72 F.2d 557 (D.C. Cir.), *cert. denied*, 293 U.S. 605 (1934); *Brown v. Rudolph*, 25 F.2d 540 (D.C. Cir.), *cert. denied*, 277 U.S. 605 (1928); *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir.), *cert. denied*, 275 U.S. 530 (1927). Insofar as these other cases do not comport with the language of more recent Supreme Court decisions, they should be regarded as reversed *sub silentio*.

²⁷ See *Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

2. Categorical Prerequisites and the Totality of Circumstances

In striking this balance in the cases which have come before it, the Supreme Court has made clear that the applicability of absolute as opposed to qualified privilege is contingent on the totality of the circumstances impinging on each case. This is not to say that there are no categorical prerequisites to the applicability of immunity arising from a defendant's employment by the executive branch of government. However, these categorical requirements serve not to distinguish cases of absolute from those of qualified immunity. Rather they single out those cases where no immunity of any kind is justified by the defendant's governmental position.

In defining two categorical prerequisites to the application of any immunity, the Court has made clear, first, that the action sought to be immunized must be within the defendant official's scope of duty.³⁹ Implicit in this conclusion is the judgment that no proper governmental purpose is served by protecting actions not taken in furtherance of one's employment duties. Second, it is established that immunity extends only to acts of a discretionary as distinguished from a ministerial nature.⁴⁰ The guiding thought is that acts required by law and

³⁹ In *Barr v. Matteo*, 360 U.S. 564 (1959), where the Court upheld the absolute privilege of the Acting Director of the Office of Rent Stabilization to issue a press release defending the integrity of his agency, the outcome turned in part on the conclusion that the action was taken "within the outer perimeter of petitioner's line of duty". *Id.* at 575.

⁴⁰ The decision in *Doe v. McMillan*, 412 U.S. 306 (1973), not to extend immunity to the Public Printer and the Superintendent of Documents rested on the judgment that their activities being challenged in the suit did not involve significant discretion on their part. *Id.* at 322-23. While *Doe* dealt with employees of the Congress, its reasoning concerning discretion is applicable to the executive branch as well. See *Barr v. Matteo*, 360 U.S. 564, 573-74 (1959).

thus lacking a significant discretionary component do not need the protection of immunity, because they will not be inhibited in any event.

Only when it is established that the action is discretionary and within the scope of duty does the question arise as to whether absolute or qualified immunity is applicable. Courts have recognized that the qualified immunity for good faith actions taken on reasonable belief and for a proper purpose⁴¹ is itself a source of substantial protection against inhibition of official action.⁴² No doubt partly because the qualified privilege

⁴¹ The Supreme Court has made clear that the reasonableness of belief and the propriety of the official's purpose which are necessary to make immunity available under the qualified doctrine are variable, depending "upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action" *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (civil rights action against state officials, including Governor). This balancing of all circumstances to determine whether a qualified immunity exists has been well demonstrated in other cases besides *Scheuer*. See *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975) (school officials); *Id.* at 327-31 (Powell, J., dissenting in part); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (Police Officers); See also *Apton v. Wilson*, 506 F.2d 83, 92 (D.C. Cir. 1974) (High officials of Justice Department, including the Attorney General).

⁴² It is noteworthy that a majority of states deem the qualified immunity to be adequate protection against executive timidity in all circumstances, and thus make no provision at all for absolute immunity for any actions by their executive officials. W. PROSSER, THE LAW OF TORTS 989 (4th ed. 1971).

See *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974) (quoting Holmes, J., to the effect that, in applying qualified immunity "great weight is to be given to [the defendant's] determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909)); *Apton v. Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974); ("The head of an executive

does provide such a significant bulwark against official timidity, the Supreme Court has made clear that the choice between absolute and qualified immunity is to rest on a far-reaching consideration of all factors which may appear relevant. Nowhere in the seminal case of *Barr v. Matteo*,³² or the subsequent cases bearing on the immunity of members of the executive branch, *Pierson v. Ray*,³³ *Doe v. McMillan*,³⁴ *Scheuer v. Rhodes*,³⁵ *Wood v. Strickland*,³⁶ and *Imbler v. Pachtman*,³⁷ is there any statement of a categorical rule governing the availability of absolute immunity. While the resulting case-by-case approach may marginally increase an official's uncertainty as to whether the immunity available to him is absolute or qualified, the harmful effect of that uncertainty is greatly mitigated by the blanket of qualified protection pertaining, in any event.³⁸ A particularistic

department, no less than the chief executive of a state, is adequately protected by a qualified immunity.") (Leventhal, J.).

³² 360 U.S. 564 (1959).

³³ 386 U.S. 547 (1967).

³⁴ 412 U.S. 306 (1973).

³⁵ 416 U.S. 232 (1974).

³⁶ 420 U.S. 308 (1975).

³⁷ 44 U.S.L.W. 4245 (2 Mar. 1976).

³⁸ A more mechanistic, categorical approach to the application of absolute immunity might eliminate many of the variables affecting the ultimate decision, and in that sense render the choice between absolute and qualified immunity more predictable for the officials most immediately interested. However, we question whether the functional sense of risk at which officials must operate would be significantly reduced at all. For under any reasonable test, absolute immunity would at least depend upon whether the act was discretionary and within the official's scope of duty. Both of these issues contain sufficient imponderables to leave any official, be he

approach to the application of absolute immunity is permissible from a governmental perspective, precisely because a powerful fall-back defense of reasonable, good faith action for a proper purpose is uniformly available.

As the Court first stated in *Barr*, absolute privilege is "an expression of a policy designed to aid in the effective functioning of government."³⁹ Since then, it has consistently applied a complex, factoring approach, to single out instances where the advancement of government operation by the recognition of absolute immunity outweighs the subordination of litigant rights involved. The mixed outcomes which the Court has reached, as well as the method and language which it has used, make clear that it is proceeding by a case-by-case, functional analysis.

Barr, itself, which upheld the absolute immunity of a sub-agency head in issuing a press release announcing suspension of two employees, clearly exhibits the approach which the Court has subsequently followed. After setting forth in detail the facts of the case, *inter alia*, that defendant's press release came in response to public challenges to the integrity of his performance of duty, the Court concluded that the plea of absolute privilege must be sustained. Noting that the "question is a close one,"⁴⁰ the Court cited in support of its conclusion the

lawyer or layman, far less than certain that he would be absolutely protected in most imaginable cases. We believe that such an ostensibly categorical test governing absolute immunity would create almost as much uncertainty of being ultimately held harmless, as does the qualified immunity test of good faith, reasonable action for a proper purpose. Therefore, at the most fundamental level we find unpersuasive the argument that officials will be inhibited if absolute immunity is made contingent on all relevant circumstances.

³⁹ 360 U.S. at 572-73.

⁴⁰ *Id.* at 574.

level of petitioner's office and his powers, the serious and imminent challenge to himself and his agency which provoked his action, and the fact that he was acting within the scope of his duty. The perception of a close question turning on the range of factual circumstances which the Court advanced belies any conclusion that the opinion was stating any sort of an automatic rule for future cases. Rather it was advancing the principle, never set forth before, that absolute immunity *may* extend to the executive officers below cabinet rank where all of the circumstances indicate that it is appropriate.

That the Court was ordering such an *ad hoc* approach is abundantly clear from the cases which it has decided in subsequent years. While several decisions have been made involving asserted immunities of employees of the executive branch, in only one, *Imbler v. Pachtman*,⁴⁴ decided this year, has the Court's primary analysis been directed to affirmance of a claim of absolute privilege.⁴⁵ That case involved a § 1983 action against a state prosecutor, alleging misfeasance in a previous criminal proceeding leading to deprivations of constitutional rights.

⁴⁴ 44 U.S.L.W. 4245 (2 Mar. 1976).

⁴⁵ In *Doe v. McMillan*, 412 U.S. 306 (1973), where the main thrust of the Court's opinion rejected a claim of immunity on behalf of the Public Printer, the Court also elected by footnote to "not disturb the judgment of the Court of Appeals" in finding District of Columbia School officials to be immune from suit. *Id.* at 324 n. 15. While the Court of Appeals appears to have recognized an absolute immunity in the officials, (although the opinion refers only to "official immunity"), 459 F.2d 1304, 1316-18 (D.C. Cir. 1972), the Supreme Court's two sentence footnote gives little indication of its own reasoning in affirming the result. Moreover there appears to be some tension between this summary conclusion and the Court's seeming unanimity in the later case of *Wood v. Strickland*, 420 U.S. 308 (1975), that school officials are generally granted only a qualified immunity. See *infra*.

After noting the prosecutor's integral position in the judicial process and the common law history supporting his absolute immunity,⁴⁶ the Court undertook a functional inquiry⁴⁷ into the adequacy of qualified privilege in this instance. It concluded, *inter alia*, that the nature of the prosecutor's job in bringing numerous actions, coupled with the delay and inconvenience implicit in dealing with each possible damage action under the qualified privilege, could result in "intolerable burdens."⁴⁸ Resting heavily on the uniqueness of the prosecutor's position, the Court noted that it had "no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that face him in the role of an administrator or investigative officer rather than an advocate."⁴⁹

Between *Barr* and *Imbler*, the Supreme Court has decided a number of cases where executive employees raised claims of official immunity, but in every case the Court's primary discussion has led it to a conclusion that only qualified immunity is appropriate.⁵⁰ Both the results of these cases and the language and reasoning they employ support reference to the totality of the circumstances to determine whether, in each case, the extra protection of absolute immunity is justified.

In *Pierson v. Ray*,⁵¹ plaintiffs brought a § 1983 action

⁴⁶ 44 U.S.L.W. at 4254-55.

⁴⁷ The Court explicitly approved "the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status. . . ." *Id.* at 4256.

⁴⁸ *Id.* at 4255.

⁴⁹ *Id.* at 4257.

⁵⁰ See note 42 *supra*.

⁵¹ 386 U.S. 547 (1967). See *Bryan v. Jones*, 44 U.S.L.W. 2521 (5th Cir. 18 May 1976) (en banc) (Extending qualified immunity to jailer, in § 1983 suit).

against police officers" who had arrested them for breach of the peace in violation of a Mississippi segregation statute, which was later found unconstitutional. Noting that "[t]he common law has never granted police officers an absolute and unqualified immunity"⁵⁰ but has conferred qualified immunity for actions in good faith and with probable cause, the Court found that common law immunity to be applicable here and remanded to the district court to determine whether the prerequisites of qualified immunity were met. The Court indicated the functional justification for the immunity by referring to the state of affairs which would prevail without it: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."⁵¹ At the same time, the reason for the good faith qualification is apparent. It arises from the officer's unique position in society, charged with the power and duty immediately to curtail liberties on a day-to-day basis.

Higher echelon executive officials were found entitled to only qualified immunity in *Scheuer v. Rhodes*,⁵² an-

⁵⁰ The action was also brought against the local judge who presided at the trial in which convictions under the unconstitutional statute were obtained. The Court found applicable the absolute immunity traditionally accorded judges, and therefore affirmed dismissal of that action. *Id.* at 553.

⁵⁰ *Id.* at 555.

⁵¹ *Id.*

⁵² 416 U.S. 232 (1974).

Our own court, speaking through Judge Leventhal, has rejected claims of absolute immunity made on behalf of the Attorney General of the United States, in the context of an action for denial of constitutional rights. *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974). In that opinion, Judge Leventhal pursued the type of analysis that we believe is appropriate

other § 1983 action, brought this time against the Governor and other Ohio state officials. That case came to the Supreme Court upon a decision by the court of appeals that defendants' conduct surrounding National Guard action against demonstrators at Kent State University were protected by a doctrine of absolute "executive immunity."⁵³ The Court set for itself the narrow task of determining the applicability of absolute immunity on the facts before it,⁵⁴ and made clear that its decision rested on a balance of the need for the immunity versus the importance of the litigant interests being pursued.⁵⁵

in all cases where a choice must be made between qualified and absolute immunity. After reviewing the common law of official immunity, he considered the specific litigant's interests at stake as weighed against the asserted need for absolute immunity. Concluding that the "head of an executive department no less than the chief executive of a state, is adequately protected by a qualified immunity, and giving heavy weight to the individual litigants' rights at stake, *id.* at 93, the court remanded for determination whether the acts at issue were shielded by the qualified immunity which it found applicable.

Other courts have found qualified immunity applicable in suits against federal agency officials. *Economou v. Department of Agriculture*, 44 U.S.L.W. 2516 (2d Cir. 11 May 1976) (§ 1983 action against Dept. of Agriculture officials); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975) (Constitutional action against I.R.S. officials).

⁵³ 416 U.S. at 238.

⁵⁴ *Id.* at 242.

⁵⁵ Final resolution of this question must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983.

Id. at 243. Noting first the historical importance of the cause of action created by § 1983, the Court also pointed out that the statute had never been read as a wholesale abolition of existing personal immunities. Citing the instances of *Tenney v. Brandhove*, 341 U.S. 367 (1951) and *Pierson v. Ray*, 386

After weighing both sides of the argument, the Court concluded:⁵⁶

U.S. 547 (1967), where pre-existing immunities were found applicable in the § 1983 context, the Court proceeded to evaluate the functional need for immunity in their case, as compared with the need recognized in *Pierson*:

When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause." In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. In common with police officers, however, officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act. When a condition of civil disorder in fact exists, there is obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others. While both federal and state laws plainly contemplate the use of force when the necessity arises, the decision to invoke military power has traditionally been viewed with suspicion and skepticism since it often involves the temporary suspension of some of our most cherished rights—government by elected civilian leaders, freedom of expression, of assembly, and of association. Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no consensus as to the appropriate remedy. In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad.

Id. at 245-47. (citation omitted).

⁵⁶ *Id.* at 247.

These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

Subsequent to *Scheuer*, the Supreme Court has decided a third case wherein it found qualified immunity applicable to employees of the executive branch of government. In *Wood v. Strickland*,⁵⁷ a § 1983 action was brought against state school administrators for expulsion of students for alleged violation of regulations prohibiting possession of intoxicating beverages at school. While the Court split 5-4 on the precise standard to be applied in evaluating defendant's good faith, the Justices were all agreed that only a qualified immunity was available to the school officials. After noting the common law tradition in support of such a qualified immunity, the Court again applied the sort of functional, balancing approach evidenced in all its previous decisions. It recognized that school officials "function at different times in the nature of legislators and adjudicators . . ." in the formulation of long term policy and in the authorization of prompt action, often on the basis of second hand information. The conferral of no immunity in such a situation "would unfairly impose upon the school decision-

⁵⁷ 420 U.S. 308 (1975).

Subsequently, in *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975), the Court affirmed in principle a lower court conclusion that the Superintendent of a State Mental Hospital was entitled to qualified immunity in a § 1983 action by a patient. While the Court did not question the conclusion that the qualified rather than the absolute doctrine was applicable, it remanded for redetermination of defendant's good faith, in light of the standard set forth in *Wood v. Strickland*.

maker the burden of mistakes made in good faith . . .” and contribute to “intimidation.”⁵⁴

But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.⁵⁵

In our view these recent decisions by the Supreme Court clearly foreclose any conclusion on our part that there is an absolute immunity for executive officials which is to be mechanistically applied to discretionary actions within the scope of duty. While a bright-line rule is to be preferred where circumstances permit, the cases make completely clear that no such rule is possible here, and no effort to distinguish the cases can demonstrate otherwise.

3. No § 1983 Distinction

An argument can be made that the cases finding qualified immunity are somehow inapposite to the case at bar, in that all were § 1983 actions, suing for infringement of federal rights. However, while the nature of the litigant interest potentially to be foreclosed by the immunity clearly should be weighed in the balance determining whether absolute or qualified immunity is applicable,⁵⁶ there is no reason to believe that the fact of a § 1983 action changes the method of determination from a mechanistic rule to a balancing process.

⁵⁴ 420 U.S. at 319.

⁵⁵ *Id.* at 320.

⁵⁶ See cases in Supreme Court, discussed *supra*, and Jaffe, *Suits Against Governments and Officers:—Damage Actions*, 77 Harv.L.Rev. 209, 225-39 (1963).

There is no logical reason that a qualitatively different approach should apply in § 1983 cases, thus rendering the reasoning of those cases inapposite to non-§ 1983 actions. Further, in the recent *Imbler* case, which upheld a claim of absolute immunity in a § 1983 action, the Supreme Court reinforced the implication of its previous decisions, “that § 1983 is to be read in harmony with general principles of tort immunity and defenses rather than in derogation of them.”⁶¹ While § 1983 may affect the type of immunity to be applied, it does not alter the balancing process by which that conclusion is ultimately reached.

4. Standards for the District Court in this Case

The question is thus presented as to what, concretely, the district court should properly consider in deciding whether the absolute or the qualified doctrine is to be applied. In general, the balancing process should weigh the added benefits resulting from the increased level of protection, against the litigant rights accordingly lost. More specifically, a number of factors meriting attention can be singled out.⁶²

⁶¹ 44 U.S.L.W. at 4253.

In support of this conclusion the Court made reference to its earlier decisions in *Tenney v. Brandhove*, 341 U.S. 367 (1951) and *Pierson v. Ray*, 386 U.S. 547 (1967), which affirmed the continuing applicability of certain common law immunities in § 1983 actions. 44 U.S.L.W. at 4253.

⁶² As noted above, the essential prerequisite for any immunity to apply, on account of one's connection to the executive branch, is a discretionary action within the scope of employment duty. It may also be possible for an official to invoke a qualified privilege from defamation action for statements outside the scope of his duties, where they satisfy the common law prerequisites for private persons, of good faith, reasonable action for a proper purpose. W. PROSSER, *THE LAW OF TORTS* 785-96 (4th ed. 1971).

On the one hand, the cases make clear that the nature of the interest being sued upon should receive significant consideration. In the Supreme Court's § 1983 decisions, involving important federal rights, this has been especially apparent.⁶³ While the litigant interest in this case does not, perhaps, rise to that level of urgency, the Supreme Court has given great weight to the interest in personal reputation, in determining due process requirements for governmental action.⁶⁴ We conclude that in the context of a libel action, the interest in reputation is likewise to be weighed heavily, and only to be subordinated to the flat bar of absolute immunity where there is reason to believe that such subordination will have an important effect on governmental functioning.

The governmental interest to be weighed against the litigant's concern to pursue his action has two basic aspects. First, the court must inquire as to how much of a difference the application of absolute as opposed to qualified immunity is likely to make in the official's performance of his duties, whatever they may be. In some contexts, such as that of the prosecutor in *Imbler*, the difference in functional protection is obvious and striking—without such an absolute immunity, a prosecutor might be paralyzed by the potential suits which numerous former defendants might file.

In other instances, the absolute protection may be of great importance not because many suits are likely, but because the extra immunity may be instrumental in leading the official to take difficult action which is vitally important to the overall performance of statutory duties. This, it seems to us, is the case in *Barr*, where a unique

⁶³ See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 243-45 (1974).

⁶⁴ *Board of Regents v. Roth*, 408 U.S. 564, 567 (1972) (dictum); *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971).

chain of events had "directly and severely challenged" "the integrity both of the defendant and of the internal operations of the agency which he headed, which made essential some action in the nature of that which was taken. The essential character of that single action to all future operations of the agency was found to justify absolute immunity, as a means of eliminating any significant risk that fear would be an immobilizing force.

To determine what contribution absolute immunity would make to Dr. Evans' performance of his duties, the district court must therefore go beyond consideration of whether he was acting in the scope of his duties, to ask how often and how importantly the threat of suit might effect the performance of duty. If, as seems unlikely, the rendering of such opinions as that at issue here is a frequent aspect of Dr. Evans' job, the analogy to *Imbler* becomes striking; the possibility of numerous, burdensome suits in which reasonable, good faith belief must always be proven would be a very important concern. If the rendering of such opinions is deemed vitally important, or there appears strong reason to believe that his opinions would be more freely given under an absolute than a qualified immunity, these factors would also weigh in favor of a determination of absolute immunity. In sum, the court must ask what practical difference absolute immunity would make in the performance of duty, over the qualified protection otherwise pertaining.

The second aspect of the functional governmental interest weighing against the affected litigant rights, is the governmental character of the duties of the official being protected. We believe that the absolute character of the immunities recognized to protect legislators⁶⁵ and

⁶⁵ 360 U.S. at 574.

⁶⁶ The relationship between absolute immunity and the full and proper performance of legislative duties has been well

judges" is in part traceable to the perception that they are charged with a public trust which can only be fulfilled in an atmosphere of completely uninhibited discourse. Insofar as an executive official's duties can similarly be characterized as involving a vital public trust, the argument for absolute protection is strengthened.

I do not, of course, mean to imply that this is an area in which clear lines can be drawn, or that there should be no absolute immunity for activities falling outside of some central core of functions that can be

recognized in Britain for several centuries, and received substantial attention from the founding fathers in light of infringement on the principle which preceded our revolution. As one of them expressed the thought:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

II *Works of James Wilson* 38 (Andrews ed. 1896), as quoted in *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951).

"The absolute immunity of judges likewise can be traced far back into English common law, and rests upon the essential function of judges in preserving public order. As Mr. Justice Field stated in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1869):

This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or his property. . . .

This exemption from civil action is for the sake of the public and not merely for the protection of the judge.

qualitatively distinguished as "governmental." All will agree that government has expanded far beyond any such idealized conception which we might like to establish, and has done so in a manner as to render futile any such effort at qualitative dichotomy. In a sense there is a public trust created in any official, regardless of duties, who is on a governmental payroll.

However, in this era of government grown far beyond any limits envisioned even at the beginning of this century, the Supreme Court's functional approach to immunity doctrine makes it entirely appropriate to recognize that many of the areas government has entered involve operations nearly indistinguishable from private endeavors, having only the most marginal effect on matters usually identified with the public sector. Insofar as that is true, our awareness that the parallel private entities have, at most, a qualified privilege for reasonable, good faith conduct, should color our perception of the immunity functionally justified for the governmental official. In the context of the comprehensive balance to be struck, this question of public versus private character is not solely determinative, but seems properly a factor to be weighed along with others. In the case of Dr. Evans' at the Smithsonian, we leave to district court assessment the degree to which his argument for absolute immunity is functionally buttressed by his governmental association.

To summarize, we conclude that absolute immunity should be granted an executive official only where these conditions are met: First, the action at issue must be discretionary and within the scope of employment duties. Second, the court must further find that the extra contribution of absolute immunity to the "effective functioning of government"⁶⁵ justifies the concomitant denial of litigant interests, in view of the part played by the challenged activity in defendant's overall performance of duties, and in view of the functions which that

⁶⁵ 360 U.S. at 573.

official performs, within a traditional conceptual framework of public and private sectors.

B. *Qualified Immunity*

If the district court concludes that absolute immunity is inapplicable on the facts of this case, it must then go on to assess whether Dr. Evans is nonetheless protected under a doctrine of qualified immunity for good faith, reasonable action. For the particulars of the application of that doctrine, resting on executive employment, we must defer to the language of the Supreme Court in those cases where it has been found applicable.⁶⁹ As to the possible relevance of a residual qualified privilege for private persons, arising out of a non-governmental interest or duty, we have nothing to add to the ample cases and commentaries.⁷⁰ We note only that the qualified privilege or immunity based on either theory is not a blanket protection for good faith action, but also has an objective component.⁷¹ While the action at issue must be taken in good faith belief in its correctness, that does not suffice. Any mistake on the part of the defendant must be objectively reasonable, in view of the pressures and duties under which he was operating, and in light of the personal interests foreseeably in jeopardy at the time the action was taken.

The decision of the district court is REVERSED in part, and the case is REMANDED for further proceedings consistent with this opinion.

⁶⁹ See *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975); *Wood v. Strickland*, 420 U.S. 308, 318-22 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 247-49 (1974); *Pierson v. Ray*, 386 U.S. 547, 557-58 (1967).

⁷⁰ See, e.g., I F. HARPER & F. JAMES, *THE LAW OF TORTS* 441-56 (1956); W. PROSSER, *THE LAW OF TORTS* 785-96 (4th ed. 1971).

⁷¹ *Wood v. Strickland*, 420 U.S. at 321; *Scheuer v. Rhodes*, 416 U.S. at 247-48.

LEVENTHAL, *Circuit Judge*: I concur in Part I of the majority opinion dismissing plaintiff's suit against the Smithsonian Institution. I dissent from a portion of Part II, concerning the suit brought against defendant Evans in his individual capacity. This is an action brought by a corporation which says its property interests were impaired when defendant Evans, an official of the Smithsonian, referred to it in disparaging terms when he answered an inquiry. If his answer was a purely personal action—outside the scope of his duty—then he is fully suable. If however he was acting within the ambit of his discretion, then under the principle of *Barr v. Matteo*¹ he is an executive officer who must be accorded full immunity from suit, and this immunity cannot be undermined by a claim that his action was rooted in personal malice.

In disregarding the principle set forth in *Barr v. Matteo*, *supra* and precedents of this court applying it,² today's majority decision goes astray, in my view. It presumes, presumptuously I think, that *Barr* has been *sub silentio* overruled, or confined to its specific facts—which was the formula in vogue in England for disregarding precedents of the House of Lords when they could not in theory be overruled. The majority does have the support of the Second Circuit's ruling in *Economou v. U.S. Department of Agriculture*, — F.2d —, 44 L.W. 2516 (April 23, 1976), but if anything *Economou* highlights the perils of seeking to define a single immunity standard applicable to all executive officials without

¹ 360 U.S. 564 (1959) (plurality); see also *Howard v. Lyons*, 360 U.S. 593 (1959).

² See, e.g., *Doe v. McMillan*, 148 U.S.App.D.C. 280, 293, 459 F.2d 1304, 1317 (1972), *affirmed in part*, 412 U.S. 306 (1973); *David v. Cohen*, 132 U.S.App.D.C. 333, 337, 407 F.2d 1268, 1272 (1969).

distinguishing between the actions involving constitutional violation and those involving solely common law torts. Putting aside overriding constitutional dimensions, the problem is the chilling effect on federal officials pursuing their duties from a doctrine that renders them suable by persons claiming disparagement. This is what *Barr* sought to avoid, and it is not faced by today's majority.

Economou rejected *Barr*, and held that only a qualified "good faith" immunity rule was applicable to Agriculture officials who were sued for \$32 million in damages by a plaintiff charging defamation and wrongful institution of administrative proceedings. Judge Mansfield's opinion discloses that what was involved was an administrative complaint, and accompanying press release, that alleged, on the basis of an audit, that *Economou* had failed to maintain the minimum prescribed capital balance required for a registered futures commission merchant. *Economou's* action was filed after an administrative law judge had issued a decision finding a violation, but while the administrative proceeding was still pending on appeal.

Administrative actions to assure compliance with regulations are essential to modern government. Suability for such actions will encourage officials to avoid taking them whenever the person involved is considered to have resources or disposition to defend with all affirmative tactics. When millions of dollars turn on such regulatory decisions, there is a strong incentive to pursue any remedy that promises some possibility of relief. *Economou's* action illuminates the danger. The prospect of savage retaliation is not a mere flight of fancy. In the not too distant past, the affected manufacturer launched an attack aimed at the removal of someone as objective and prestigious as a Bureau of Standards head, for the Bureau's conclusion that a battery additive did not test up

to its claims. The risk of court actions and of the need to find time and money for a defense³ against potentially catastrophic financial liability, would have a chilling, if not paralyzing, effect on an official's inclination to exercise his discretion in accordance with the public interest when a claim of unjustified disparagement of business reputation can be made a sword.

As the *Economou* court recognized, if *Barr* had governed its decision, its inquiry would have stopped if "the alleged conduct of the defendants in the present case was 'within the outer perimeter of their authority' and involved the exercise of discretion."⁴ Absolute immunity would have been properly invoked, and the case dismissed. Instead the court denied *Barr* precedential effect and sought to follow subsequent § 1983 cases—e.g., *Pierson*,

³ Although government counsel now often defend even personal actions against federal officers arising out of their official duties, they are not required to do so. See, e.g., 28 U.S.C. § 517 (1970):

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

⁴ Slip op. at 3399. In the case before us, the trial judge did not adequately explore this issue below. Although Evans' responsibilities included responding to information inquiries from foreign governments in his field, the record does not elucidate whether official replies had to be channelled in a certain manner; whether Smithsonian officials respond to personal inquiries in their official capacity, and if the letter was a personal letter whether it is considered proper for several officials to comment independently on foreign queries. These considerations are relevant to the determination of whether Evans acted within the perimeter of his responsibilities or whether, as plaintiff claims, he was acting in a personal capacity.

*Scheuer, Wood*⁵—applying common law rules of qualified immunity.

In seeking to “neaten up” this corner of the law, neither *Economou* nor the majority today recognizes that the very “common law” they so eagerly invoke for an across-the-board qualified immunity rule also lacked a consistent immunity standard. Absolute immunity has historically been recognized and protected for judges,⁶ legislators,⁷ and people very close to their protected sphere of action like prosecutors.⁸ In the context of vindicating constitutional rights violated by state officials, the Supreme Court has looked to state common law rules for the qualified immunity doctrine governing the executive branch exercising executive functions. But when the Supreme Court evaluated the *federal* common law rule governing officials charged with damaging reputations during their performance of discretionary duties, the

⁵ *Pierson v. Ray*, 386 U.S. 547 (1967); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975). See also *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Apton v. Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974); *Mark v. Groff*, 521 F.2d 1376 (9th Cir. 1975).

⁶ See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

⁷ *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Brewster*, 408 U.S. 501 (1972); *Dombrowski v. Eastland*, 387 U.S. 82 (1967); *United States v. Johnson*, 383 U.S. 169 (1966).

⁸ *Imbler v. Pachtman*, 96 S.Ct. 984, 995 (1976). The Court specifically refused to consider whether the immunity granted to prosecutors acting as officers of the court would extend to “those aspects of the prosecutor’s responsibility that cast him in the role of administrator or investigative officer.” In *Apton v. Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974), this court extended *Scheuer v. Rhodes* to an action alleging infringement of Fourth and Fifth Amendment rights by officials of the Justice Department considered to be acting outside the judicial umbrella.

Court weighed the interests on both sides and decided that absolute immunity should be the standard:⁹

It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:

... The justification for [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith . . . *Gregoire v. Biddle*, 177 F.2d 579, 581.

In appraising whether official duties are discretionary¹⁰ so as to invoke this absolute immunity doctrine,

⁹ 360 U.S. at 571.

¹⁰ This court has previously indicated how to carry out analysis of whether a duty is discretionary: “The test of whether a challenged action is ministerial or non-ministerial is not the office *per se* or its height, but whether the function itself was of such discretionary nature that the threat of litigation would impede the official to whom it was assigned.” *David v. Cohen*, 132 U.S.App.D.C. 333, 337, 407 F.2d 1268, 1272 (1969). The court also stated that the position of an official in the executive hierarchy is not determinative of the

the *Barr* Court considered whether the officer, whatever his rank, must possess the discretion if the public service is to function effectively. 360 U.S. at 575. If the official has a duty that encompasses the sound exercise of discretionary authority, then it suffices to establish absolute immunity that the action taken was "within the outer perimeter of [his] line of duty," and the court must disregard even an allegation of malice. Malice may of course mean injustice, and it would defeat the qualified immunity available to private persons at common law. In the overall balance, however, Justice Harlan concluded in *Barr* that any instance of actual injustice is the price paid for the greater public good, of avoiding undue restriction of the discretion of an official to speak out in the course of his duty. 360 U.S. at 575.

Both *Barr* and this case involve an action for defamation. At stake here is damage to business reputation—an interest of no greater weight than the interest in personal reputation involved in *Barr*. Damage to reputation is not inconsequential,¹¹ and Congress might have

discretionary-nondiscretionary evaluation: "Thus, while the the actions of a low-ranking administrative official are more likely to be ministerial, the privilege has been extended to administrative as well as judicial officials and to personnel whose position is low as well as to those whose rank is high." *Ibid.*

See also *Doe v. McMillan*, where this court held that the D.C. defendants were immune on a determination that (1) the individual was performing acts within the scope of his official duties, and (2) the action undertaken required the exercise of his discretion. *Doe v. McMillan*, 148 U.S.App.D.C. 280, 293, 459 F.2d 1304, 1317 (1972). The Supreme Court affirmed, stating (412 U.S. at 324): "With respect to the District of Columbia respondents, the Court of Appeals found that they were acting within the scope of their authority under applicable law and, as a result, were immune from suit. We do not disturb the judgment of the Court of Appeals in this respect."

¹¹ The interest in personal reputation can qualify for due process protection. See *Board of Regents v. Roth*, 408 U.S.

done better not to exempt the tort of defamation from the Tort Claims Act. But when it comes to holding an individual official rather than the government liable for damages to reputation, the doctrine established in *Barr* intercedes, unless and until the Supreme Court or Congress overrules it.

The Supreme Court decisions in § 1983 cases do not overrule *Barr*. They rather establish the rule for cases where fundamental constitutional rights are involved, and declare that ordinary rules of official immunity must yield when the executive is charged not merely with abuse of discretion but with exercising his special power as a government official in a way prohibited by the Constitution. In *Scheuer v. Rhodes*,¹² Chief Justice Burger did not jettison *Barr*—he rather cited it and its antecedent, *Spalding v. Vilas*, 161 U.S. 483 (1896),¹³ as cases illuminating the inherent necessity of providing broad protection to executive discretionary acts in the context of defamation actions. He noted, however, that *Barr* and *Spalding* arose "in a context other than a § 1983 suit" (at 247), and did not extend the absolute immunity those cases granted to federal executive officials, holding that state officials sued under § 1983 could only claim qualified immunity. Chief Justice Burger's opinion makes the reason clear: Since § 1983 gives an action against state officials when constitutional violations were invoked, it is patently inconsistent with that statutory action to

564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). But see *Paul v. Davis*, 96 S.Ct. 1155 (1976).

¹² 416 U.S. 232 (1974).

¹³ *Spalding* held that the head of an executive department has absolute immunity for special communications made by him pursuant to an act of Congress for matters within his authority.

recognize an absolute immunity for all officials subject to suit under its provisions.¹⁴

The doctrine of qualified immunity developed for state executive officials sued under § 1983¹⁵ is manifestly sound. Similarly sound was this court's extension of the

¹⁴ Final resolution of [the scope of qualified immunity] must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983. In neither of these inquiries do we write on a clean slate. It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe v. Pape*, . . . Mr. Justice Douglas, writing for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." . . . Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."

Since the statute relied on thus included within its scope the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," *id.*, at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms. Indeed, as the Court also indicated in *Monroe v. Pape*, *supra*, the legislative history indicates that there is no absolute immunity

Scheuer v. Rhodes, 416 U.S. 232, 243 (1974).

Cf. Imbler v. Pachtman, 96 S.Ct. 984 (1976) and *Pierson v. Ray*, 386 U.S. 547 (1967), where it was nevertheless recognized that some state officials—prosecutors and judges—could be held absolutely immune under § 1983 so long as they were exercising judicial or quasi-judicial powers.

¹⁵ See cases cited at note 5, *infra*.

principle of *Scheuer v. Rhodes* to a case not strictly within § 1983—because it involved officials of the Federal Government (Justice Department) and of the District of Columbia—but similar in the respect that plaintiffs were claiming violation of constitutional rights. *Apton v. Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974). At the risk of immodesty—for I am quoting myself, yet take comfort from the fact that Judge Wilkey concurred in the opinion—the opinion pointed out that *Apton's* case involved Fourth and Fifth Amendment rights and continued: "The individual rights at stake here are of the same magnitude as those asserted in *Scheuer*. Freedom from arbitrary arrest and detention are among our most cherished liberties."¹⁶ The *Apton* opinion discussed *Barr* and *Spalding* and brought out that they "focused on the particular injuries alleged there—loss of contract in *Spalding* and injury to reputation in *Barr*."¹⁷ It stated that the soundness of any extension of *Barr* must be appraised in the light of *Scheuer*, and concluded that an extension of *Barr* to the area of constitutional injuries would not be justified or consistent with the principle underlying *Scheuer*. Today, however, the court errs, I submit, when it holds that *Barr* may be set to one side, even in a case that is not underpinned by a substantial claim of infringement of constitutional rights.¹⁸

Only three years ago, the Supreme Court rapped the knuckles of a distinguished federal judge who had con-

¹⁶ 165 U.S.App.D.C. at 32, 506 F.2d at 93.

¹⁷ 165 U.S.App.D.C. at 30, 506 F.2d at 91.

¹⁸ A similar analysis of the distinction drawn in the cases between constitutional and common law torts can be found in a recently published comment. See Note, *Damages for Federal Employment Discrimination: Section 1981 and Qualified Executive Immunity*, 85 YALE L.J. 518, 528. See also *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146, 1159 (4th Cir. 1974).

cluded that the rationale of a Supreme Court decision had been substantially undermined by a later Supreme Court decision. *United States v. Mason*, 412 U.S. 391 (1973). The Court commented (412 U.S. at 395): "It must be noted, however, that the *Squire* court did not purport to question or overrule *West*, and, indeed, did not so much as mention that decision." The same must be said for *Barr*. As for Judge Mansfield's opinion in *Economou*, apart from one's "difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of this [Supreme] Court" (see 412 U.S. at 396), I think today's majority would be better advised to follow Judge Mansfield's course earlier this year, when he applied Judge Friendly's sage advice: "[W]e continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions," see *United States v. Karathanos*, 44 U.S.L.W. 2406 (2d Cir., Feb. 2, 1976), quoting *Salerno v. American League of Prof. Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970), cert. den., 400 U.S. 1001 (1971). Of course, every rule is subject to limits, and there may be occasions when a judge can say that he cannot consistently with the demands of conscience of a constitutional judge adhere to an old decision and reach results inconsistent with later Supreme Court rulings. But that is hardly the case today when the intervening Supreme Court rulings can be distinguished as involving constitutional claims—a point that can hardly be deemed inconsequential, and one that was, indeed, identified by the Chief Justice in *Scheuer* (see 416 U.S. at 243).

Today the majority says that *Barr* must be read restrictively, and that its application to different fact situations requires a new balancing test *ab initio*. The § 1983 cases they rely on however, seem, by contrast, to provide definitive rulings as to immunity for specific

executive and judicial functions.¹⁹ Even reading *Barr* narrowly, without extension, it should at least be taken to have established a federal common law rule that for suits involving defamation by executive officials, absolute immunity can be invoked as a defense.²⁰ That absolute immunity is not spoken to in *Imbler*, *supra*—which was concerned with the different rule of absolute immunity for the judicial process (and held that it was so firmly settled that it applied to actions under § 1983). With all respect, I think today's majority and *Economou* off the point both in their reliance on *Imbler*,²¹ and also in *Economou*'s reference to cases involving state (not federal) common law applicable to state executive officials.²²

Unless and until the Supreme Court says so, I do not think *Barr v. Matteo* is to be confined to its particular

¹⁹ See, e.g., *Pierson*, *infra*, (unconstitutional arrests by police officers); *Imbler*, *infra* (prosecutorial, quasi-judicial acts).

²⁰ As to a cause of action for defamation, *Paul v. David*, 96 S.Ct. 1155 (1976) apparently precludes a § 1983 suit.

²¹ *Economou*'s reliance on *Imbler* is particularly curious in light of Judge Mansfield's reliance on Justice White's concurrence in that case, 96 S.Ct. at 996-7, reasoning that "since the effect of a grant of immunity is to 'negate pro tanto the very remedy which Congress sought to create [by enactment of 42 U.S.C. § 1983] . . . the Court has not extended absolute immunity to such officials in the absence of a showing that the immunity is necessary.'" Slip op. at 3406. The fair import of this statement by Justice White, like the similar statement by Chief Justice Burger in *Scheuer*, is that Congressional enactment of § 1983 makes impossible an automatic extension of the absolute immunity otherwise applicable to high executive officers.

²² Confusing the separate lines of tort immunity developed for executive officials in state and federal courts seems to stem from the problems of federalism raised by § 1983's provision of a federal remedy against state officials, and the necessity of reconciling state immunity rules for state officials with federal statutory liability policies.

facts—in plain English is to be taken as a ruling without precedential force. Rejecting the doctrine of *Barr* for a “particularistic”²³ inquiry into liability would not merely trammel the ruling but jettison its purpose, for it would insert the chill that *Barr* sought to avoid.

While I do not propose to become involved in the particularistic weighting program launched by the majority, its inquiry might have benefited from discussion by the parties, whose attention was not focused on this issue. Indeed, the almost casual attitude of government counsel to this issue of personal liability is not without its overtones, though I can hardly condemn them for relying on *Barr* as a clear precedent directly in point. And while courts do have a license of sorts to expatiate at large, I am much concerned with the passage in today’s majority opinion that contemplates a return to the discredited governmental-proprietary distinction, in a particularly unlikely context. See *Parker v. Brown*, 317 U.S. 341 (1943); *Spencer v. General Hospital of D.C.*, 138 U.S. App.D.C. 48, 425 F.2d 479 (1969), followed in *Wade v. District of Columbia*, 310 A.2d 857 (D.C.C.A. 1973). A large number of government departments, maybe most, conduct activities that have some private counterpart—weather and crop reports; inspection of ships, and trucks for safety; testing materials; delivery of packages and even mail, etc. If the governmental officials are performing discretionary functions, they should have the same immunity, or privilege to comment and question, without regard to whether the functions are of such a nature that they can be performed by private agencies. If private individuals run an economic risk when they volunteer a comment they at least have the general prospect of gain from private economic enterprise. There is no comparable private profit pulling on government officials acting within the perimeter of their discretionary duties.

²³ See majority opinion at 16.

In sum, both *Economou* and today’s majority undercut *Barr* by allowing federal officials to be subject to substantial involvement in a lawsuit whenever an individual or company experiences harm to reputation as a result of actions taken pursuant to regulatory authority.²⁴ Such officials get legal representation by the government only at the discretion of the Attorney General;²⁵ even passing the monetary costs, involvement in protracted litigation, unpredictably governed by an ad hoc balancing test, is costly in time and anxiety. Overruling *Barr* can only exacerbate a serious problem of government—the tendency of bureaucrats to sit tight rather than take action likely to rile the individuals or groups being regulated. For every case of malicious governmental action potentially remedied under such a rule, hundreds if not thousands of other actions in the public interest may be deferred or omitted. There is too much to be said for the *Barr* choice, there was too much hard work and hard thought when the problem was faced squarely by great judges like John Harlan and Learned Hand, to sweep it aside as the detritus of a doctrine that has been nibbled away *sub silentio*.

²⁴ *Economou* adopted an immunity rule applicable to the actions for both defamation and wrongful institution of administrative proceedings.

²⁵ See note 3, *infra*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXPEDITIONS UNLIMITED AQUATIC]	
ENTERPRISES, INC., <i>ET AL.</i> ,		
<i>Plaintiffs,</i>]	
v.]	Civil Action
		No. 54-71
]	
SMITHSONIAN INSTITUTION, <i>ET AL.</i> ,		FILED
<i>Defendants.</i>]	July 3, 1974
		JAMES F. DAVEY,
		Clerk

ORDER

Upon consideration of the plaintiffs' motion to vacate this Court's previous Order of December 19, 1972 denying plaintiffs' motion to vacate and re-enter this Court's judgment of January 17, 1972 in favor of defendants; and now to vacate and re-enter said judgment of January 17, 1972 in favor of defendants as of the current date; and the points and authorities attached thereto, it is by the Court this 31st day of July, 1974.

ORDERED, that this Court's previous Order of December 19, 1972 denying plaintiffs' motion to vacate and re-enter this Court's judgment of January 17, 1972 in favor of defendants, be, and it is hereby vacated, and be it

FURTHER ORDERED, that this Court's judgment of January 17, 1972 in favor of defendants, be, and it is hereby vacated, and re-entered as of this date, the 31st day of July, 1974.

/s/ Joseph Waddy
JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EXPEDITIONS UNLIMITED AQUATIC]	***
ENTERPRISES, INC., <i>et al.</i> ,		
<i>Plaintiffs,</i>]	
v.]	Civil Action
		No. 54-71
]	
SMITHSONIAN INSTITUTION, <i>et al.</i> ,		
<i>Defendants.</i>]	

ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANTS

Upon consideration of the pleadings and of defendants' motion to dismiss the complaint herein, or, in the alternative, for summary judgment, the affidavits, exhibits and points and authorities in support thereof, and of plaintiffs' opposition to said motion and defendants' reply to said opposition, and the Court concluding therefrom that the defendant, Smithsonian Institution, is an establishment of the United States and a "Federal Agency" within the meaning of the Federal Tort Claims Act, 28 U.S.C. §2671, et seq., which by Section 2680 was expressly excepted from being sued for libel, and that the United States has not elsewhere authorized the maintenance of such suit against it, and the Court further concluding that the act of the defendant, Evans, was within the outer perimeter of his Federal employment, and that there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law, it is by the Court this 17th day of January, 1972,

ORDERED, that the motion of the defendants for summary judgment be and the same is granted and that summary judgment is hereby granted in their behalf.

/s/ Joseph Waddy
JUDGE

NOV 18 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-418

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.

and

NORMAN SCOTT,

Petitioners,

v.

SMITHSONIAN INSTITUTION, et al.,

Respondents.

**SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-418

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.

and

NORMAN SCOTT,

Petitioners,

v.

SMITHSONIAN INSTITUTION, *et al.*,

Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott, pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit, *en banc*, entered in this proceeding on September 16, 1977.

OPINIONS BELOW

The Opinion of the Court of Appeals entered July 28, 1976, was vacated by Order of Court on October 20, 1976 (Appendix C). The Opinion of the Court of Appeals, *en banc*, entered September 16, 1977, appears in the Appendix hereto as Appendix D, and is not yet reported.

JURISDICTION

The Judgment and Opinion of the Court of Appeals for the District of Columbia Circuit entered June 28, 1976, was vacated, and a new Judgment was entered by the Court of Appeals, *en banc*, on September 16, 1977. This Supplement to Petition for Writ of Certiorari was filed within ninety (90) days of that date. The original Petition for Writ of Certiorari, upon the issue of immunity of the Smithsonian Institution, was filed within ninety (90) days of June 28, 1976. As the Court of Appeals' decision, *en banc*, reinstated that portion of the June 28, 1976, decision which dealt with the Smithsonian Institution, without reconsideration, Petitioners' original Petition for Certiorari which deals with that portion of the Court of Appeals' decision is incorporated herein. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

SUPPLEMENTAL QUESTION PRESENTED

Does *Barr v. Matteo*, 360 U.S. 564 (1959), endow a middle level federal employee with absolute immunity to maliciously publish false and defamatory statements concerning private individuals?

SUPPLEMENTAL STATEMENT OF THE CASE

In its January 17, 1972, Order, the District Court ruled in addition to its dismissal of the action against the Smithsonian Institution, that "the Act of the defendant, Evans, was within the outer perimeter of his Federal employment," and that he was therefore entitled to Summary Judgment. (Appendix B to original Petition, at 45a). In its Judgment entered September 16, 1977, the Court of Appeals, *en banc*, held that *Barr v. Matteo*, 360 U.S. 564 (1959), mandated absolute immunity for statements made within the scope of his duties as a government employee, and remanded on the issue of whether Evans was acting within the outer perimeter of his employment.

In its Opinion of September 16, 1977, the Court of Appeals, *en banc*, also reinstated without further consideration the June 28, 1976, Opinion of the panel holding that the Federal Tort Claims Act endowed the Smithsonian Institution with sovereign immunity.

REASONS FOR GRANTING THE WRIT AS TO THE SUPPLEMENTAL QUESTION PRESENTED

I. To Resolve An Important Federal Question Which Has Not Been Settled By This Court.

The decision of the United States Court of Appeals for the District of Columbia Circuit should be reviewed because the instant issue is an important federal question which has not been settled by this court.

The issue involved is the delicate balance between protecting a middle level government employee from suits for libel versus permitting a private citizen to recover for substantial damages caused by false and malicious defamatory

statements by an individual purporting to speak with the authority of the government.

The significance of the issue is brought forth by the greatly expanding size of government and the concomitant increase in the number of citizens who attempt to bring themselves behind the shield of absolute immunity.

This action is the appropriate one through which to view the issue because the federal employee charged with maliciously publishing the defamatory statement which brought financial ruin upon plaintiffs was not an individual charged with high government duty whose time and energies must be zealously preserved for the public good, but an anthropologist, whose governmental function was limited to noncritical educational and academic pursuits.

The issue of absolute immunity in libel cases for federal employees has been dealt with in this court before. *Doe v. McMillan*, 412 U.S. 306 (1973); *Barr v. Matteo*, 360 U.S. 564 (1959); *Howard v. Lyons*, 360 U.S. 593 (1959).

The Court of Appeals proclaimed strict applicability of *Barr v. Matteo*, *supra*, to the instant case. In so doing, it committed error both in its Opinion that *Barr* was ever intended to extend to instances such as the present case, and in its failure to recognize the significant erosion of the principles set forth in *Barr* by subsequent decisions of the Supreme Court and Court of Appeals. This is brought into focus best by Judge Robinson's concurring Opinion in the Court of Appeals, wherein he states, after reviewing his increasing difficulty to reconcile *Barr* with numerous other emerging legal principles:

I speak to these matters to acknowledge a dilemma, and not in any endeavor to orchestrate the field of public-servant liability, in which the Supreme Court occupies by far the major role. It may be that further enlightenment will come from the Court's forthcoming *Economou* decision. In any event, my bounden duty at the moment is to follow *Barr*, in my view without any effort at reexamination of its holding or its rationale. For "[s]ave only for the exceptional cases where the proper decisional result is very clear, it is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since." (Appendix D, *Robinson*, concurring, at 79a, footnotes omitted.)

The most obvious reason that *Barr* does not apply here is that it was never intended to grant absolute immunity to all federal employees. The public official involved in *Barr* was "the Acting Director of an important agency of government [who] was clothed with 'all powers, duties and functions conferred on the President . . .,' " where the integrity of the internal operations of the agency which he headed . . . had been directly and severely challenged on the floor of the Senate and given wide publicity. . . ." 360 U.S. at 574. No attempt was made to hold that a privilege exists for all governmental officials, much less governmental employees.

The alleged defamatory material in *Barr* was a press release announcing the suspension of plaintiffs for their responsibility in effectuating a plan to reallocate funds earmarked for terminal-leave payments to pay accrued annual leave. The position of the Acting Director was that such plan violated the spirit of the *Thomas Amendment*. (64

Stat. 768). The press release was issued primarily in response to Senate inquiry into the propriety of the plan.

Even though the conduct complained of concerned the head of a government agency, was responsive to Senatorial inquiry and concerned important questions of misallocations of funds, this court's holding of absolute privilege in *Barr* was endorsed by only five Justices, with the other four filing strong dissents. Even the majority conceded that this was a close case. 360 U.S. at 574. Thus, only where the rights of the citizen must yield in the national interest for the effective functioning of government can a citizen be forced to suffer the injuries caused by unscrupulous federal employees. This indicates that the doctrine of absolute privilege should not be extended beyond the facts in *Barr*.

The instant action presents a prime example of the misapplication of *Barr*. The "government official" involved herein is an anthropologist serving as Chairman of the Department of Anthropology of the Smithsonian Institution's Museum of Natural History. It is most noteworthy that *Evans'* employer is not the federal government, itself, but the Smithsonian Institution, which has a private character and performs not governmental functions, but functions of a private museum. No question of an agency head announcing action with respect to activity under Congressional inquiry (360 U.S. at 574-75) or comments relating to "the quality of government service rendered by . . . elective or appointed public officials or employees" (360 U.S. at 577, *Black J.*, concurring) is involved. What is at issue here is whether a middle level professional may call upon the prestige of the institution for which he works and with a sweep of his pen blackball a private citizen from his chosen and practiced profession without fear of personal responsibility for the destruction his actions may

bring upon the defamed individual. Such unbridled power gained solely from the position of employment creates a grave risk to private citizens whose reputation may be their most prized asset. To permit such abuse of power to destroy the rights of individuals without accountability must shock the conscience of even the most ardent bureaucrat.

The damage to private individuals of permitting defamatory statements to escape atonement is too clear to necessitate delineation. In balance, however, the burden to the government caused by requiring employees such as the one involved here to answer for their acts is *de minimis*. First, no restraint is imposed upon a federal employee by subjecting him to libel suits for criticizing the way a federal agency or its employees perform their duties, since the instant case involves statements defaming a private corporation and individual. (See *Barr v. Matteo*, 360 U.S. 564, 577 (1959), *Black J.*, concurring). Secondly, neither governmental time and energy need be expended nor the fearless, vigorous and effective administration of policies of government need be threatened by requiring an employee of the Smithsonian Institution to answer for his acts. (See *Barr v. Matteo*, *supra*, at 571). Finally, defendant *Evans* cannot be deemed an official of government to which *Barr v. Matteo* was meant to apply, since his services relate to an Institution which is at the very least semi-private in nature.

A reading of *Barr v. Matteo* makes it clear that it was not intended to extend to situations such as the instant case and should not be permitted to apply beyond its present scope. *Barr* was never meant to empower federal employees to operate their own blackball system at whim. Therefore, the rationale of *Barr* should be rendered inapplicable to factual situations such as presented by the instant case.

In addition to the fact that *Barr* was never intended to apply to the instant case, its erosion by subsequent decisions leaves its value as a precedent in serious question and suggests strongly that this court reconcile the subsequent inconsistent legal rulings. It is this erosion which caused Judge Wilkey to concur *dubitante* in the Court of Appeals and Judge Robinson to express difficulty in reconciling *Barr* with subsequent precedent in his concurring Opinion. Appendix D.

The case which most clearly marks *Barr* as a decision with limited application was *Doe v. McMillan*, 412 U.S. 306 (1973). In *Doe*, this Court rejected a holding that the Public Printer be absolutely privileged for whatever it prints. The Court's comments relating to *Barr* are most revealing. The Court recognized the limited application of immunity as follows:

The official immunity doctrine which "has in large part been of judicial making," *Barr v. Matteo*, 360 US, at 569, 3 L Ed 2d 1434, confers immunity on government officials of suitable rank for the reason that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. *Id.*, at 571, 3 L Ed 2d 1434. 412 U.S. at 318-319 (footnote omitted).

It is apparent that under this statutory framework, the printing of documents and their general distribution to the public would be "within the

outer perimeter" of the statutory duties of the Public Printer and the Superintendent of Documents. *Barr v. Matteo*, 360 US at 575, 3 L Ed 2d 1434. Thus, if official immunity automatically attaches to any conduct expressly or impliedly authorized by law, the Court of Appeals correctly dismissed the complaint against these officials. This, however, is not the governing rule.

Id. at 322.

The Court also stated that:

In the *Barr* case, the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes.

Id. at 319.

This Court reversed the Court of Appeals for applying the doctrine of official immunity too broadly. *Id.* at 324.

Recognition of the declining impact of *Barr* among the circuits is most strikingly set forth in *Economou v. United States Department of Agriculture*, 535 F.2d 688 (2d Cir. 1976), *cert. granted*, *Sub. nom.*, *Butz v. Economou*, 429 U.S. 1089 (1977). In *Economou*, the Second Circuit examined Supreme Court cases issued subsequent to *Barr* and found *Barr* to be of dubious precedent. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Pierson v. Ray*, 386 U.S. 547 (1967).

Further, a line of cases, referred to in all Opinions in the Court of Appeals, have held federal employees not absolutely immune from actions under U.S.C. § 1983. *E.g.*,

Wood v. Strickland, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

The majority of the Court of Appeals dismissed these cases as inapplicable since they deal with "fundamental constitutional rights" (Appendix at 55a), terming the right to be free from destruction of reputation by federal employees as "not as basic to a free society as the Fourth Amendment right to be free from arbitrary search or seizure." (Appendix at 57a). The concurring Opinions could not dismiss the cases so lightly (Appendix D, at 22-30 and 31-50). Indeed the permanent loss of reputation may be as serious a violation of due process as a temporary, though unconstitutional warrantless search is a violation of the Fourth Amendment. See, e.g., *Board of Rights v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

Judge Robinson's concurring Opinion best presents the dilemma posed if *Barr* immunity is followed for common law torts, but not for § 1983 actions by his observations that, as most constitutional torts have analogues in the common law, the value of *Barr* immunity designed to spare the official from litigation is lost since he would have to defend the constitutional claim in any event. (Appendix at 76a-78a, *Robinson*, concurring).

Because of the issue of whether the scope of *Barr v. Matteo* extends to all federal employees, and whether *Barr v. Matteo* has been effectively eroded by subsequent decisions, the status of official immunity for federal employees is unsettled and should be reviewed by this Court.

As the Court of Appeals' decision is in direct conflict with *Economou v. United States Department of Agriculture*, 535 F.2d 688 (2d Cir. 1976), cert. granted, Sub. nom., *Butz v. Economou*, 429 U.S. 1089 (1977), it is respectfully requested that this matter be considered with *Economou*, or that decision on this Petition be stayed pending an Opinion in *Economou*.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted as to both issues presented.

Respectfully submitted,

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1899

SEPTEMBER TERM, 1976

Expeditions Unlimited Aquatic
Enterprises, Inc., a corporation
AppellantUNITED STATES COURT
OF APPEALS
for the District of Columbia Circuit

Norman Scott

FILED OCT. 20, 1976

v.

GEORGE A. FISHER
CLERK

Smithsonian Institution, et al.

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm,
Leventhal, Robinson, MacKinnon, Robb and
Wilkey, Circuit Judges.ORDEROn consideration of appellees' petition for rehearing and
suggestion for rehearing *en banc*, it isORDERED by the Court, *en banc*, that the above en-
titled case shall be reheard by the Court sitting *en banc*,
and it isFURTHER ORDERED by the Court, *en banc*, *sua*
sponte, that the judgment filed June 28, 1976 and the
opinions filed June 28, 1976 are hereby vacated.*Per Curiam*

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
ClerkCircuit Judge Tamm votes to deny the suggestion for rehear-
ing *en banc*.

APPENDIX D

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1899

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.,
A CORPORATION, APPELLANT
NORMAN SCOTT

v.

SMITHSONIAN INSTITUTION, ET AL.

ON REHEARING EN BANC

Argued En Banc December 16, 1976

Decided September 16, 1977

Judgment entered
this date

John J. Pyne for appellant.

Robert E. Kopp, Attorney, Department of Justice for
appellees. *Earl J. Silbert*, United States Attorney, *John*
A. Terry and *Jeffrey T. Demerath*, Assistant United
States Attorneys and *Suzanne D. Murphy*, Office of the

Bills of costs must be filed within 14 days after entry of judgment. The
court looks with disfavor upon motions to file bills of costs out of time.

General Counsel, Smithsonian Institution were on the brief for appellees. *Barbara L. Herwig*, Attorney, Department of Justice also entered an appearance for appellees.

Before BAZELON, Chief Judge, and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and WILKEY, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge LEVENTHAL*.

Concurring opinion filed by *Circuit Judge ROBINSON*, with whom *Circuit Judge WRIGHT* joins.

Concurring (*dubitante*) opinion filed by *Circuit Judge WILKEY*.

LEVENTHAL, *Circuit Judge*: This opinion considers the issue of the conflict between the public interest in shielding responsible government officials against the harassment of vindictive or ill-founded law suits and the interest of those whose reputations may have been injured by statements of government officials. In *Barr v. Mateo*,¹ the Supreme Court struck the balance in favor of the officials. We do not view that 1959 ruling as undercut by later decisions, and adhere to it.

Plaintiff, Expeditions Unlimited, brought an action for libel against Clifford Evans, Chairman of the Department of Anthropology at the Smithsonian Institution's Museum of Natural History, and against the Smithsonian Institution. The action is based on a letter by Evans in which he was critical of plaintiff's capabilities in the field of underwater archaeological excavation. The district court granted summary judgment for defendant Smithsonian Institution on governmental immunity grounds.² The district court granted sum-

¹ 360 U.S. 564 (1959).

² That judgment was affirmed by the panel for the reasons stated in Judge Wilkey's opinion. After ordering sua sponte

mary judgment for defendant Evans on the grounds of his absolute privilege in making statements within the scope of his duties as a government employee. We remand for further exploration of the issue whether Evans was acting within the ambit of his employment.³ However, we agree with the district court that if Evans was acting within the ambit of his discretion, he would have absolute immunity. We do not reinstate the view in the panel opinion that there might be only a qualified privilege. We now state our reasons.

that the issue of the Smithsonian's immunity would be decided without oral argument under Rule 11(e), the en banc court chose not to consider the matter. The portion of the panel opinion dealing with the Smithsonian is therefore reinstated as the opinion of the panel and for convenience is reprinted in the appendix.

As to the immunity defense raised by the individual defendant Evans, the panel opinion, Judge Leventhal dissenting, ordered a remand to the district court to determine whether the case was appropriate for absolute immunity or qualified immunity. It contemplated an individualized inquiry into whether the added benefits derived from the award of absolute immunity to the official outweighed the loss of litigant rights. It set out a number of factors for the district court to consider, including the nature of the litigant's interest, the expected impact of the differing immunities on the performance of the official's duty and the governmental as opposed to private character of that duty.

³ Although Evans' responsibilities included responding to information inquiries from foreign governments in his field, the record does not elucidate whether official replies had to be channelled in a certain manner, whether Smithsonian officials respond to personal inquiries in their official capacity, and if the letter was a personal letter whether it is considered proper for several officials to comment independently on foreign queries. These considerations are relevant to the determination of whether Evans acted within the perimeter of his responsibilities or whether, as plaintiff claims, he was acting in a personal capacity.

It was the fear of chilling legitimate official conduct that motivated the Supreme Court's decision in the seminal case of *Barr v. Mateo*, *supra*. *Barr* also involved an action for defamation. There, the Acting Director of the Office of Rent Stabilization, a federal agency, was sued by another government employee who claimed that the Acting Director had maliciously issued a press release injurious to the employee's reputation. The Court held that once it had been established that the action taken "was within the outer perimeter of [his] line of duty," the Acting Director was entitled to absolute immunity against liability in damages even though his action was a discretionary exercise and was allegedly prompted by malice. 360 U.S. at 575. Justice Harlan⁴ reasoned that an absolute privilege was required because

... officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

360 U.S. at 571.

The federal common law rule of absolute immunity of officials sued for defamation furthers the goal of effective administration of government in the public inter-

⁴ While only three other justices concurred in Justice Harlan's opinion, his views on the doctrine of absolute immunity did command a majority of the Court. Justice Stewart dissented only because he felt that under the particular facts of *Barr*, the official was acting beyond the outer perimeter of his duties. 360 U.S. at 592. See also *Howard v. Lyons*, 360 U.S. 593 (1959).

⁵ The need to determine whether an official is acting within the outer perimeter of his duties will not defeat the purpose of absolute immunity. For example, on the facts of this case,

est.⁵ A qualified immunity would be dependent upon a myriad of factors and a particularistic assessment of the facts of each case,⁶ leaving an official at hazard to anticipate whether or not he is protected. "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon circumstances and motivations of his actions, as established by the evidence at trial." *Imbler v. Pachtman*, 424 U.S. 409, 419 n. 13 (1976). Even the need to find the time and money for a defense⁷ would have a chilling, if not para-

the determination of whether Evans was acting within the scope of his employment may be made on the basis of affidavits from his superiors elucidating his duties and the procedures usually followed in answering queries from foreign governments. This type of limited inquiry may typically be dealt with on a motion for summary judgment. Even at trial the issue is for the court. The official knows the scope of his discretion. The possibility of such an inquiry is unlikely to deter any official in the vigorous pursuit of his responsibilities.

⁶ In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), which held that state executive officers sued under 42 U.S.C. § 1983 were only entitled to a qualified immunity, the Supreme Court explained that the limited privilege was dependent upon "the existence of reasonable grounds for belief formed at the time and in light of all the circumstances, coupled with good faith belief. . . ."

416 U.S. at 247-248.

⁷ Although government counsel now often defend even personal actions against federal officers arising out of their official duties, they are not required to do so. See, e.g., 28 U.S.C. § 517 (1970):

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

lyzing, effect on an official's willingness to speak out, in the exercise of his discretion, to further the public interest.

At the time we granted rehearing en banc we were aware of *Economou v. U.S. Department of Agriculture*, 535 F.2d 688 (2nd Cir. 1976).^{*} We disagree with *Economou*, and view it, indeed, as illustrating the dangers of a doctrine providing only qualified immunity. There, an administrative complaint and accompanying press release of the Department of Agriculture had alleged, on the basis of an audit, that *Economou* had failed to maintain the minimum prescribed capital balance required for a registered futures commission merchant. An administrative law judge issued a decision finding a violation. While the administrative proceeding was pending on appeal, *Economou*, alleging defamation and wrongful institution of administrative proceedings, sued various officials of the Department of Agriculture, including the administrative law judge, for \$32 million in damages.

As the *Economou* court recognized, if *Barr* had governed its decision, its inquiry would have stopped if "the alleged conduct of the defendants . . . was 'within the outer perimeter of their authority' and involved the exercise of discretion." 535 F.2d at 691. Instead, the court, rejecting *Barr*, held that only a qualified "good faith" immunity was applicable, and remanded the case for further proceedings.

This rejection of *Barr* can only exacerbate an already serious problem of modern government—the tendency of bureaucrats to sit tight rather than take action likely to rile the individuals or groups being regulated. The

^{*} Subsequent to the oral argument en banc in December, 1976, the Supreme Court granted certiorari, *sub nom* Butz v. *Economou*, 429 U.S. 1089 (1977).

nation's welfare is dependent upon officials who are willing to speak forthrightly and disclose violations of the law and other activities contrary to the public interest.⁹ Their voices will be stilled if they perceive or fear that the person involved has the resources or disposition to defend with all affirmative tactics. When millions may turn on regulatory decisions, there is a strong incentive to counter-attack.

In *Economou*, the Second Circuit suggested that *Barr* had been undermined by the Supreme Court's decisions in cases arising under 42 U.S.C. § 1983. We disagree.¹⁰ The Supreme Court decisions in § 1983 cases do not overrule *Barr*. They rather establish the rule for cases where fundamental, constitutional rights are involved, and declare that ordinary rules of official immunity must yield when the executive is charged with exercising his special power as a government official in a way prohibited by the Constitution. In *Scheuer v. Rhodes*,¹¹ far from undercutting *Barr*, Chief Justice Burger cited *Barr*

⁹ See *Federal Trade Commission v. Cinderella Career and Finishing Schools, Inc.*, 131 U.S.App.D.C. 331, 404 F.2d 1308 (1968), where this court, in a situation not unlike that in *Economou*, refused to enjoin the Federal Trade Commission's issuance of a press release about a proceeding for unfair trade practices, even though we recognized that the petitioner might prevail before the administrative agency and would then be unable to remedy the injury caused by the adverse publicity. Our decision was based on the fact that the FTC could only achieve its goal of protecting the consumer by informing him of the actions it was taking in his behalf. 131 U.S.App.D.C. at 337, 404 F.2d at 1314.

¹⁰ For decisions of other circuits citing *Barr* with approval, see, e.g., *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976); *Mandel v. Nouse*, 509 F.2d 1031, 1033 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975).

¹¹ 416 U.S. 232, 246-247 (1974).

and its antecedent, *Spalding v. Vilas*,¹² as cases illuminating the inherent necessity of providing broad protection to executive discretionary acts in the context of defamation actions. He noted, however, that *Barr* and *Spalding* arose "in a context other than a § 1983 suit" (at 247). The absolute immunity those cases granted to federal executive officials was not extended to state officials sued under § 1983; they could claim only qualified immunity. Chief Justice Burger's opinion makes the reason clear: Since § 1983 gives an action against state officials when constitutional violations are invoked, it is patently inconsistent with that federal statutory action to apply a federal common law rule of absolute immunity for executive officials subjected to suit by the statute.¹³ While

¹² 161 U.S. 483 (1896). *Spalding* held that the head of an executive department has absolute immunity for special communications made by him pursuant to an act of Congress for matters within his authority.

¹³ See *Scheuer v. Rhodes*, 416 U.S. at 243:

Final resolution of [the scope of qualified immunity] must take into account the functions and responsibilities of these particular defendants in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983. In neither of these inquiries do we write on a clean slate. It can hardly be argued, at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. In *Monroe v. Pape*, . . . Mr. Justice Douglas, writing for the Court, held that the section in question was meant "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." . . . Through the Civil Rights statutes, Congress intended "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." . . .

Since the statute relied on thus included within its scope the "[m]isuse of power, possessed by virtue of a state law and made possible only because the wrongdoer is

§ 1983 retains the absolute immunity of officials exercising power within the judicial or quasi-judicial ambit," the plain provision for suits against officials in the executive branch precludes an absolute immunity defense.

Our decision in *Apton v. Wilson*, 165 U.S.App.D.C. 22, 506 F.2d 83 (1974), extended the *Scheuer* rule of qualified immunity in § 1983 cases to an action against federal officials that involved one of our "most cherished liberties," the freedom from arbitrary arrest and detention. 165 U.S.App.D.C. at 32, 506 F.2d at 93.

The defamation action in the case at bar involves damage to business reputation—an interest of no greater weight than the interest in personal reputation involved in *Barr*. While damage to reputation is not inconsequential, and can, under some circumstances, qualify for procedural protection under the due process clause,¹⁴ it is not as basic to a free society as the Fourth Amendment right to be free from arbitrary search and seizure of person or property, a right so precious that a remedy in damages has been inferred from the Constitution itself. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Nor is *Barr* undercut by *Doe v. McMillan*, 412 U.S. 306 (1973). That was essentially a case involving legis-

clothed with the authority of state law," *id.*, at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)), government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability from its terms. Indeed, as the Court also indicated in *Monroe v. Pape*, *supra*, the legislative history indicates that there is no absolute immunity.

¹⁴ *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 386 U.S. 547 (1967).

¹⁵ See *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). But see *Paul v. Davis*, 424 U.S. 693 (1976).

lative immunity, under the speech or debate clause, and the Court remanded for a determination of the extent of legislative immunity. *Doe* involved a suit by parents for invasion of privacy from the dissemination of a congressional report that identified students in derogatory contexts. The ruling as to Public Printer and the Superintendent of Documents was only that they did not have an absolute immunity greater than the immunity of the legislators who tendered the documents for printing. The Court held that although they acted "within the outer perimeter" of their statutory duties in printing what was tendered, they had no "independent immunity." 412 U.S. at 322-23. The Court's decision was responsive to the character of the Government Printing Office, which acts as a service organization for the three branches of government. 412 U.S. at 322. The Court concluded that for purposes of the judicially-fashioned doctrine of immunity, the officials of the Printing Office were immune from the suit only to the extent that they were acting within the "sphere of legitimate legislative activity." 412 U.S. at 324.

Barr premises that it is better to leave unredressed some defamations¹⁶ by officers acting out of malice or excess zeal, than to subject the conscientious to the

¹⁶ Under certain circumstances, declaratory and injunctive relief may be obtained against defamatory statements by government officials. For example, in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), the Supreme Court held it was possible for several organizations which claimed they had been defamed to obtain declaratory and injunctive relief to strike their names from the Attorney General's list of subversive organizations. 341 U.S. at 139-40. The availability of this equitable relief is consistent with the rationale of *Barr* since it does not involve the personal liability of an official, and is therefore unlikely to deter him in the vigorous pursuance of his duties. *B. C. Morton International Corporation v. Federal Deposit Insurance Corporation*, 305 F.2d 692, 695-96 (1st Cir. 1962).

constant dread of retaliation. For every case of malicious governmental action potentially remedied by replacing *Barr* with a qualified immunity, hundreds if not thousands of other actions in the public interest may be deferred or omitted. There is too much to be said for the *Barr* choice, there was too much hard work and hard thought when the problem was faced squarely by great judges like John Harlan and Learned Hand, to sweep it aside as the detritus of a doctrine that has been nibbled away *sub silentio*.

The judgment in favor of defendant Smithsonian Institution is affirmed. The judgment in favor of defendant Evans is remanded for limited inquiry whether his letter was within the outer perimeter of his duties.

So ordered.

APPENDIX

The part of the panel opinion in this case dealing with the Smithsonian Institution is reinstated as the opinion of the panel. Majority slip op. at 1 n.2. It is reprinted here for convenience.

No. 74-1899

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.,
A CORPORATION, APPELLANT
NORMAN SCOTT

v.

SMITHSONIAN INSTITUTION, ET AL.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action 54-71)

Argued 18 September 1975

Decided 28 June 1976

John J. Pyne, for appellant.

Jeffrey T. Demerath, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney and *John A. Terry* and *Suzanne D. Murphy*, Assistant United States Attorneys, were on the brief for appellee.

Before: LEVENTHAL and WILKEY, *Circuit Judges* and SOLOMON,* *United States Senior District Judge* for the District of Oregon

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

WILKEY, *Circuit Judge*: This case comes before us on appeal from an order of summary judgment entered 31 July 1974,¹ in an action for libel brought by petitioners against the Smithsonian Institution and its Regents, and against Clifford Evans, Chairman of the Department of Anthropology at the Museum of Natural History. The claim arose out of a letter written by Evans, in which he expressed views as to the capabilities of petitioner Expeditions Unlimited in the field of underwater archaeological excavation. The merits of the libel claim are not presently before us, since summary judgment for defendants was granted on the grounds of Smithsonian's governmental immunity and Evans' absolute privilege in making statements within the scope of his duties as a government employee.

IMMUNITY OF THE SMITHSONIAN INSTITUTION

The holding of the district court that the Smithsonian Institution may not be sued for libel is affirmed. That conclusion rests upon our reading of the Federal Tort Claims Act. Because we find that the Tort Claims Act should be read as granting federal agencies immunity from suit for libel, we do not reach the issue of the Institution's immunity status at common law.

In finding immunity under the Act, the initial step is to determine whether the defendant organization is a "federal agency" within the definition set forth in the statute.² Although the Smithsonian has a substantial

¹ App. at 6-8.

² 28 U.S.C. § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agen-

private dimension,³ we conclude that the nature of its function as a national museum and center of scholarship, coupled with the substantial governmental role in funding⁴ and oversight,⁵ make the institution an "independent establishment of the United States," within the "federal agency" definition.⁶

cies of the United States, but does not include any contractor with the United States.

* * * * *

³ The Smithsonian has private endowment funds which in 1970 totalled \$33 million. *General Hearings Before the Subcommittee on Library and Memorials*, 91st Cong., 2d Sess., 323 (1970) (hereinafter *Hearings*). In that year over \$15 million of private money went toward operations of the Institution, and almost one-third of the employees were non-federal. *Id.* at 253.

⁴ Approximately 75% of the Institution's operating funds come from federal appropriations. *Hearings, supra* note 3, at 253, 321.

⁵ Eight of the seventeen Regents of the Institution acquire their positions by virtue of holding other high positions in the federal government. 20 U.S.C. § 42 (1970). The remaining Regents are appointed by joint resolution of Congress. 20 U.S.C. § 43 (1970). The Institution is audited periodically by the General Accounting Office. *See Hearings, supra* note 3, at 362-97.

⁶ 28 U.S.C. § 2671 (1970). While there is no outstanding stock of the Smithsonian, it has more in common with the "mixed ownership government corporations," 31 U.S.C. § 856 (1970), like the F.D.I.C., which have been found to be "federal agencies," *Davis v. F.D.I.C.*, 369 F.Supp. 277, 279 (D. Colo. 1974); *Freeling v. F.D.I.C.*, 221 F.Supp. 955, 955-56, (W.D. Okla. 1962), than with corporations whose only significant governmental contact is a federal charter. *Pearl v. United States*, 230 F.2d 243, 245 (10th Cir. 1956) (Civil Air Patrol held not a federal agency). The substantial federal funding and the important supervisory role played by governmental officials are the most important factors linking it to the government. *Cf. United States v. Orleans*, 44 U.S.L.W. 4700 (1 June 1976); *Logue v. United States*, 412 U.S. 521 (1973).

Section 1346(b) of Title 28, U.S.C., creates, subject to the provisions of 28 U.S.C. §§ 2671-80, a remedy against the United States for injuries wrongfully caused by any "employee of the government." Because the Smithsonian is a federal agency, its employees are employees of the government," and the § 1346(b) action thus may lie.⁸ Under 28 U.S.C. § 2679(a), the § 1346(b) remedy is made exclusive in cases where that section applies, even where an agency may elsewhere be authorized to sue and be sued in its own right.⁹ However, under 28 U.S.C. § 2680(h), the provisions of the Tort Claims Act, including the jurisdictional provision, § 1346(b), are made inapplicable to libel actions, such as the one presently before us.¹⁰ The difficult interpretive problem posed by this case is to determine the effect of this exceptions clause.

On the one hand, the exceptions clause might be viewed as making the Tort Claims Act entirely inapplicable to

⁸ 28 U.S.C. § 1346(b) (1970).

⁹ 28 U.S.C. § 2671 (1970).

⁹ 28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

¹⁰ 28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentations, deceit, or interference with contract rights.

libel actions, in which event the common law immunity status of a defendant would govern, and an action might be possible if independent jurisdictional grounds could be found. On the other hand, § 2680(h) could be seen as imposing a bar to suit, if the Tort Claims Act is regarded as a systematic statute governing all tort claims, with the exceptions clauses setting forth the areas where suit is to be barred.

There are significant arguments to be made in favor of the first view. The language of the exceptions section makes no reference to any creation or, more properly, continuation of long established governmental immunity in the categories of cases it sets forth. Rather, the exceptions section only states that the provisions of the Tort Claims Act "shall not apply."¹¹ It would not be illogical to conclude that, in these categories of cases, the Act neither creates nor removes immunity but leaves the question of suability as it was before the Act, to be determined by other statutes and by common law rules. This interpretation is further bolstered by the construction which has been given to § 2680(l) and (m), which except the Tennessee Valley Authority and the Panama Canal Company from the Act's provisions. These parallel provisions to the libel exception (h) have consistently been held not to create any immunity, but to allow suit

¹¹ There is not only the language of § 2680, the exceptions section, but its interrelation with § 1346(b), the jurisdictional section. The section entitled "Exceptions" begins: "The provisions of . . . section 1346(b) of this title shall not apply to . . . (h) Any claim arising out of . . . libel, slander . . ." If the section conferring jurisdiction simply does "not apply," can the Tort Claims Act have any relationship to an action for libel? We conclude that it does, but the answer appears by no means as simple as has been assumed.

to be brought against the organizations just as before the Act, under separate statutory authorizations.¹²

While logic and a consistent reading of the statute would, by themselves, thus lead us outside the Act at the very start, to inquire as to the Smithsonian's common law immunity status and as to other possible bases of jurisdiction, other factors cause us to reject this approach. Legislative history, the great weight of judicial precedent, and a desire to facilitate future application of the Act, convince us that § 2680(h) should be read as an affirmative grant of immunity to "federal agencies" in the types of deliberate tort cases which it describes.

We conclude from the structure of the Tort Claims Act, and from the legislative reports accompanying its passage, that Congress probably did not intend to leave unaffected by the Act the categories of suits excepted by § 2680(h). While primarily seeking to expand governmental liability for torts, it appears to us that Congress also sought to systematize and centralize the immunity laws.¹³ One evidence of this appears in § 2679(a) of the statute, which in essence renders ineffective any other laws allowing suit or creating remedies against an agency, where the actions "are cognizable under section

¹² *Gardner v. Panama R.R.*, 342 U.S. 29, 31 (1951) (dictum); *Brewer v. Sheco Construction Co.*, 327 F.Supp. 1017, 1018-19 (W.D. Ky. 1971); *Latch v. T.V.A.*, 312 F.Supp. 1069, 1071-72 (N.D. Miss. 1970); *De Scala v. Panama Canal Co.*, 222 F.Supp. 931, 934 (S.D.N.Y. 1963). The Congressional reports accompanying the Act explicitly indicate that some of the exceptions were included because "adequate remedies were already available." H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); S.Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946).

¹³ See *Wickman v. Inland Waterways Corp.*, 78 F.Supp. 284, 286 (D. Minn. 1948).

1346(b)."¹⁴ Another evidence of this centralizing impulse appears in the context of exceptions clause § 2680 (a).¹⁵ This section sets forth the category of discretionary activity, for which immunity has traditionally been granted. That Congress bothered to include it in the exceptions section is consistent with the view that it meant to embody, within § 2680 all of the instances in which immunity is to exist under the statute. It seems to us an unreasonable conclusion, at least in the instances of exceptions (a) and (h), that Congress intended for courts to go beyond the Act, and inquire into common law immunity status and alternative jurisdictional grounds.

More affirmative, though still ambiguous, evidence that Congress saw itself as pre-empting the common law of

¹⁴ 28 U.S.C. § 2679(a) (1970). The exception clauses dealing with the T.V.A. and the Panama Canal Company, 28 U.S.C. § 2680 (l) and (m) (1970), were clearly not intended to bar suit under separate authorizing statutes, see note 12 *supra*, and thus these clauses weaken somewhat the argument that the Act was intended to centralize all laws concerning federal governmental immunity. However, the uniqueness of these organizations, coupled with the fact that their amenability to suit was well established at the time the exceptions were adopted, lead us to conclude that we are not bound by rigid parallelism to clauses (l) and (m) in our construction of clause (h).

¹⁵ 28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

immunity appears in the reports which accompanied the bill through the House and Senate. In discussing the exclusivity provision,¹⁶ the reports of both chambers make the following statement:¹⁷

This will place torts of "suable" agencies of the United States upon precisely the same footing as torts of "nonsuable" agencies. In both cases, the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act, as, for example, the suits in Admiralty Act. It is intended that neither corporate status nor "sue and be sued" clauses shall, alone, be the basis for suits for money recovery sounding in tort.

From these statements may be inferred a general intent to treat all federal agencies alike as regards immunity, irrespective of what their immunity status was at common law.¹⁸ We find it likely that Congress conceived of

¹⁶ Now 28 U.S.C. § 2679(a) (1970).

¹⁷ H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess., 33-34 (1946) (emphasis added).

¹⁸ However, this inference is not compelled by the actual language of the reports. The reports' statement, that suability clauses in agency charters do not affect the applicability of the Tort Claims Act, would not be in conflict with a view that common law immunity doctrine governs in cases thrown outside the Act by the language of the exceptions clause. Nor would the statement that corporate status alone is not a basis for suit, be in conflict with a conclusion that the Smithsonian may have no operative immunity arising from common law, in light of its corporate status and its unique mix of private and governmental operations, funding, and management. The language about the exception clauses either preventing recovery or leaving recovery to another Act also presents no inconsistency, since even if a court were to find operative com-

itself as codifying the immunity law, and eliminating any necessity to look at the common law, once it is concluded that the defendant is a federal agency within the definition of the Act.

We might perhaps take a different view of legislative intent if this were a matter of first impression. But we give weight to the fact that since the time of enactment, it has been the consistent practice of the federal courts to read both exceptions (a) and (h) as defining grants of immunity to "federal agencies."¹⁹ The courts' consistent sense of legislative intention is impressive even though the decisions fail to acknowledge the difficulty presented by the literal text.²⁰

We are also influenced, we must confess, by the consideration that a contrary reading of the statute would lead to perplexing questions as to the state of the common law, while not leading to a clear change of result in any

mon law immunity, a jurisdictional statute ("some other act") apart from the Act's § 1346(b) would have to be found for any suit to be entertained, at least in federal court.

¹⁹ *Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345 (D.C. Cir.), cert. denied, 366 U.S. 910 (1961); *United States v. Delta Indus. Inc.*, 275 F.Supp. 934, 936-37 (N.D. Ohio 1966); *James v. F.D.I.C.*, 231 F.Supp. 475, 477 (W.D. La. 1964); *Freeling v. F.D.I.C.*, 221 F.Supp. 955, 956-57 (W.D. Okla. 1962).

²⁰ In *Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 346 (D.C. Cir. 1961) the court asserts that libel claims "are cognizable under section 1346(b)" within the meaning of the exclusiveness of remedy provision, § 2679(a), even though the exceptions clause of § 2680(h) flatly states that the provisions of § 1346(b) "shall not apply to" libel. Cf. *Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941, 946 (D.C. Cir. 1975), where the court observed, "If the claim falls outside the Act completely or within one of the exceptions-to-liability embodied in the statute, . . ." without finding it necessary to explain how the claim for negligent misrepresentation might "fall outside the Act completely."

imaginable case. For there to be any difference in result, the defendant would have to be within the "federal agency" definition of § 2674, and yet be sufficiently private as to lead to the inference that Congress, in creating the organization, intended not to render it immune.²¹ Were both of these conditions met, it would be necessary, further, that the subject matter of the suit be within one of the clauses of § 2680 which are presently construed to confer immunity.

We cannot envisage that more than a few, if any, cases would meet all of these requirements, and thus be decided differently under a literal reading of the Act. Yet to determine whether it might be applicable would require the courts in a considerable array of cases to make a complex and speculative inquiry into common law immunity status.²² We think the legislature intended the courts to decide suability questions by direct reference to the statute rather than by pursuit of the will-o'-the-wisp of the prior law. We conclude that exception clause (h) should continue to be read as defining the existence of immunity in suits involving deliberate torts, and that the summary judgment in favor of Smithsonian should be affirmed.

²¹ For discussions of how immunity status would be determined at common law, see *R.F.C. v. Menihan Corp.*, 312 U.S. 81, 84 (1941); *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940); *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 389 (1939).

²² Case law indicates that the inquiry as to common law immunity must focus on whether Congress intended to confer immunity at the time the organization was created. See cases cited, note 21 *supra*. Yet it appears unlikely that any directly expressed Congressional intent could ever be found in the instance of a federal agency created after the passage of the Tort Claims Act, since Congress almost certainly gave no consideration to the immunity issue, but deferred instead to the framework of the Act.

ROBINSON, *Circuit Judge*, with whom WRIGHT, *Circuit Judge*, joins, concurring: This case cannot plausibly be distinguished from *Barr v. Mateo*¹ and surely we are not at liberty to disregard the Supreme Court's unmistakable holding therein. Perhaps that is all that really needs to be said. Frankness, however, compels me to admit increasing difficulty in reconciling *Barr* with other strands of jurisprudence evolving on the amenability of public servants to suits for damages.² I join in the disposition of this case, then, not out of any ability to divine the ultimate schematism of this area of the law, but because of the judge's duty to abide controlling precedent.

Few would suggest that public officers be made answerable in damages for good-faith errors in judgment, even when the result is exceedingly unfortunate. Fewer still would condone venally or maliciously motivated acts by public functionaries or their oftentimes appalling consequences. If recompense to victims implicated no more than the purses of callous bureaucrats, there would be no need for official immunity, for the availability of some sort of good faith defense would suffice to separate the sheep from the goats.

The problem is not nearly so simple, however, because a great deal more than monetary liability is at stake. The ease with which malice can be charged leaves open the possibility that even the conscientious public servant will be dogged by suitors. The mere prospect of a lawsuit may deter even the otherwise courageous official from the full and ardent discharge of altogether lawful duties, lest he become enmeshed in vexatious, though unfounded, litigation.

¹ 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

² See notes 6-20 *infra* and accompanying text.

When an officer thus deviates from whole-hearted conservation of the common weal, the public interest is to that extent disserved. The virtue of absolute immunity for public functionaries, as well as its sole justification, is that it safeguards against that measure of disservice. So it was that, with full appreciation of society's weighty interest in fairness to those injured by improper manipulation of the levers of government, the *Barr* Court struck the balance on the side of averting litigation of defamation claims, whether ill-founded or not, arising from statements made in the line of federal duty.³ "[T]here may be occasional instances of actual injustice which may go unredressed," the Court said, "but we think that price a necessary one to pay for the greater good."⁴ And, by extension of *Barr*, the generally accepted rule today is that the federal officeholder is totally immune to suit for damages attributed to any common law tort emanating from non-ministerial conduct within the outer perimeter of his official authority.⁵

³ 360 U.S. at 571-576, 79 S.Ct. at 1339-1342, 3 L.Ed.2d at 1441-1444.

⁴ *Id.* at 576, 79 S.Ct. at 1344, 3 L.Ed.2d at 1442.

⁵ See, e.g., *David v. Cohen*, 132 U.S.App.D.C. 333, 337, 407 F.2d 1268, 1272 (1969) (defamation, abuse of process and malicious prosecution) and cases cited therein; *Berberian v. Gibney*, 514 F.2d 790, 793 (1st Cir. 1975) (abuse of process); *Peterson v. Weinberger*, 508 F.2d 45, 52 (5th Cir.), *cert. denied*, 423 U.S. 830, 96 S.Ct. 50, 46 L.Ed.2d 47 (1975) (interference with contractual relations); *Estate of Burks v. Ross*, 438 F.2d 230, 234-236 (6th Cir. 1971) (negligence); *Ruderer v. Meyer*, 413 F.2d 175, 178-179 (8th Cir.), *cert. denied*, 396 U.S. 936, 90 S.Ct. 280, 24 L.Ed.2d 235 (1969) (defamation and conspiracy); *Sowder v. Damron*, 457 F.2d 1182, 1184-1186 (10th Cir. 1972) (intentional infliction of emotional distress). See generally K. Davis, *Administrative Law of the Seventies*, § 26.00-2 at 580 (1976); K. Davis, *Administrative Law* §§ 26.01, 26.04 at 871, 875-880 (1970 Supp.).

Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 *et seq.* (1970 & Supp. V 1975), one who is injured by "the negli-

Developments in related quarters, however, have introduced assymetry in the field of official immunity. More than a century ago, by what is now 28 U.S.C. § 1983, Congress authorized civil actions by those deprived of federally secured rights through action under color of state law.⁶ Much more recently, notwithstanding the

gent or wrongful act or omission of any employee of the [Federal] Government while acting within the scope of his office or employment" has an action against the Government, 28 U.S.C. § 1346(b) (1970), and that remedy, where it obtains, is exclusive. 28 U.S.C. § 2679(a) (1970). But 28 U.S.C. § 2680(h) (Supp. IV 1974) exempts generally certain intentional torts from the operation of the Act. As a means of accommodating the antagonistic interests at stake in cases like that at bar, it has been urged that these exemptions be repealed, thus enabling the victim to recover from the Government but not the officer—who might then be the more susceptible to sanctions for misbehavior since the damage award would be coming out of his superior's budget. See K. Davis, *Administrative Law of the Seventies*, *supra*, § 26.03 at 584-597. See also Davis, *An Approach to Legal Control of the Police*, 52 Tex. L. Rev. 703, 720 n.47 (1974).

Congress has in fact taken a step in that direction by amending the Federal Tort Claims Act to permit recovery exclusively against the Government on claims of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" against federal investigative or law enforcement officers. Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50, 28 U.S.C. §§ 2679-2680 (Supp. V 1975). The amendments as originally proposed would have extended to all federal employees, but were ultimately reduced to their present form. See Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendments: An Interpretative Analysis*, 54 N. C. L. Rev. 497, 517 (1976).

⁶ What is now 42 U.S.C. § 1983 (1970) was enacted in 1871 in order to supplement preexisting criminal penalties with civil remedies. See *Monroe v. Pape*, 365 U.S. 167, 171, 81 S.Ct. 473, 475-476, 5 L.Ed.2d. 492, 496-497 (1961); *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1155 (1977). Federal jurisdiction to entertain § 1983 actions is conferred by 28 U.S.C. § 1343(3) (1970).

facial broadness of Section 1983, The Supreme Court has recognized immunities for state officers from civil damage suits thereunder.⁷ Unlike the invariably absolute immunity which *Barr* attaches to non-ministerial activity precipitating common law tort actions against those in federal service, immunity inherent in the functions of particular state offices for purposes of Section 1983 may be either absolute or qualified.⁸ More importantly, the process of formulating Section 1983 immunities has involved careful appraisal of the degree to which the operations of the office might be impaired by the specter of groundless suit, and a weighing of the assessment thereon against the remedial purposes of the statute.⁹ This

⁷ The Court first addressed the issue in *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 788, 95 L.Ed. 1019, 1026-1027 (1951) (legislators immune from liability in damages when "acting in the sphere of legitimate legislative activity"). Earlier cases had not adverted to the possibility of such immunities. See, e.g., *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944); *Lane v. Wilson*, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *Nixon v. Herndon*, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927). The Court has also construed § 1983 as affording absolute immunity to state judges, *Pierson v. Ray*, 386 U.S. 547, 554-555, 87 S.Ct. 1213, 1217-1218, 18 L.Ed.2d 288, 294-295 (1967), and prosecutors, *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). A qualified, "good faith" immunity under § 1983 has been extended to the superintendent of a state mental hospital, *O'Connor v. Donaldson*, 422 U.S. 563, 577, 95 S.Ct. 2486, 2494-2495, 45 L.Ed.2d 396, 408 (1975); members of a school board and other school officials, *Wood v. Strickland*, 420 U.S. 308, 321-322, 95 S.Ct. 992, 1000-1001, 43 L.Ed.2d 214, 224-225 (1975); the governor and other high state executive officers, *Scheuer v. Rhodes*, 416 U.S. 232, 247-248, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90, 103-104 (1974); and police officers, *Pierson v. Ray*, *supra*, 386 U.S. at 557, 87 S.Ct. at 1219, 18 L.Ed.2d at 296.

⁸ See note 7 *supra*.

⁹ Compare, e.g., *Imbler v. Pachtman*, *supra* note 7, 424 U.S. at 424-425, 96 S.Ct. at 992, 47 L.Ed.2d at 140 (threat of suit

category-by-category approach to immunity determinations, sensitive both to costs and to benefits, stands in sharp contrast to the *Barr* choice of immunity, which varies neither with the value of the premium it confers nor with the potential for harm it leaves in its wake.

Of course, congressional specification in Section 1983 of a right to monetary relief rules out judicial interposition of absolute immunity,¹⁰ save only where a court may infer that Congress did not intend the statute to operate.¹¹ On the other hand, damage actions against federal officials for transgression of common law norms, such as the defamation action that was *Barr*, do not encounter any manifestation of legislative will that might stifle judicial implication of unlimited and unqualified immunity. What brings this doctrinal consonance to the point of discord is the still-developing body of law shaping the suability of federal functionaries for damages charged to unconstitutional depredations. There, as in the situation *Barr* epitomizes, the judicial hand is unfettered

"would undermine performance of [a prosecutor's] duties" because of the frequency with which a disgruntled defendant would "transform his resentment . . . into the ascription of improper and malicious" motives), with *Wood v. Strickland*, *supra* note 7, 420 U.S. at 320, 95 S.Ct. at 1000, 43 L.Ed.2d at 224 ("absolute immunity [is not] justified since it would not sufficiently increase the ability of school officials to exercise their discretion . . . to warrant the absence of a remedy"), and *Scheuer v. Rhodes*, *supra* note 7, 416 U.S. at 243, 94 S.Ct. at 1690, 40 L.Ed.2d at 100 ("[f]inal resolution of [the immunity] question must take into account the functions and responsibilities of these particular defendants . . . , as well as the purposes of 42 U.S.C. § 1983").

¹⁰ See *Scheuer v. Rhodes*, *supra* note 7, 416 U.S. at 243, 94 S.Ct. at 1690, 40 L.Ed.2d at 100.

¹¹ See, e.g., *Pierson v. Ray*, *supra* note 7, 386 U.S. at 554, 87 S.Ct. at 1218, 18 L.Ed.2d at 295; *Tenney v. Brandhove*, *supra* note 7, 341 U.S. at 376, 71 S.Ct. at 788, 95 L.Ed. at 1026-1027.

by the legislature's command;¹² yet, since the Section 1983 immunity decisions have been deemed authoritative,¹³ the immunity in vogue in that area may be either qualified or absolute.¹⁴ The upshot is that one kind of judicially-fashioned immunity is available to federal officials in fending off damage suits founded on constitutional claims, and quite another—the *Barr*-type—to such officials in repulsing suits invoking the common law.¹⁵

The incongruity between immunities available to the same officer exercising the same functions, depending only upon the genesis of the legal standard by which his

¹² See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619, 625-626 (1971) (the "Federal question" whether Fourth Amendment rights have been invaded involves a claim independent of statute, "both necessary and sufficient to make out the plaintiff's cause of action"). Cf. K. Davis, *Administrative Law of the Seventies*, *supra* note 5, § 26.00-2 at 583-584 (noting that "[t]he *Barr* case applies to common law torts, and the Supreme Court in *Bivens* created a new federal common law tort"). See also Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1540-1543 (1972).

¹³ See, e.g., *Apton v. Wilson*, 165 U.S.App.D.C. 22, 31-33, 506 F.2d 83, 92-93 (1974); *Black v. United States*, 534 F.2d 524, 526 (2d Cir. 1976); *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1346 (2d Cir. 1972); *Paton v. La Prade*, 524 F.2d 862, 871 (3d Cir. 1975); *States Marine Lines, Inc. v. Shultz*, 498 F.2d 1146, 1159 (4th Cir. 1974); *Tritsis v. Backer*, 501 F.2d 1021, 1022 (7th Cir. 1974); *Jones v. United States*, 536 F.2d 269, 271 (8th Cir. 1976); *Midwest Growers Co-op Corp. v. Kirkemo*, 533 F.2d 455, 463-464 (9th Cir. 1976); *Mark v. Groff*, 521 F.2d 1376, 1380 (9th Cir. 1975).

¹⁴ See cases cited *supra* note 13 and *infra* note 18.

¹⁵ See, e.g., K. Davis, *Administrative Law of the Seventies*, *supra* note 5, § 26.00-2 at 573; Second Circuit Note, 1975 Term, 51 St. John L. Rev. 251, 275-276 (1977). But see *Economou v. United States Dep't of Agriculture*, 535 F.2d 688 (2d Cir. 1976), *cert. granted*, — U.S. —, — S.Ct. —, — L.Ed.2d — (1977).

behavior is to be measured, strikes at the very foundations of the *Barr* rule. Many if not most constitutional torts have analogues in the common law.¹⁶ Thus the official who finds himself charged with a tort of each sort—a common posture¹⁷—may assert against the com-

¹⁶ As indicated by such cases as *Monroe v. Pape*, *supra* note 6, 365 U.S. at 169, 81 S.Ct. at 474, 5 L.Ed.2d at 495, and *Bell v. Hood*, 327 U.S. 678, 679, 66 S.Ct. 773, 774, 90 L.Ed. 939, 940 (1946), an action grounded in the Constitution's protections against unlawful searches and seizures may also contain allegations sufficient to generate a variety of common law claims, including trespass or unlawful entry, abuse of process, assault, false imprisonment, conversion and even intentional infliction of emotional distress. Cf. *Dellums v. Powell*, No. 75-1974 (D.C. Cir. Aug. 4, 1977) at 7-9 and cases cited therein; *Payne v. District of Columbia*, No. 74-1861 (D.C. Cir. June 7, 1977) at 9-10 (per Robinson, J.); *Norton v. Turner*, 427 F.Supp. 138, 140 (E.D. Va. 1977). So might an actionable violation of the First Amendment involve similarly tortious activity. *Dellums v. Powell*, *supra*, at 50 & n.80. An outrageous instance of medical malpractice may, if practiced in a prison, infringe the Eighth Amendment. Cf. *Estelle v. Gamble*, 429 U.S. 97, 106-107, 97 S.Ct. 285, 292-293, 50 L.Ed.2d 251, 261-262 (1977). In limited circumstances, a breach of contract may implicate the Due Process Clause, cf. *Cardinale v. Washington Technical Inst.*, 163 U.S.App.D.C. 123, 128, 500 F.2d 791, 796 (1974), as may a libel. Compare *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), with *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971).

¹⁷ Common law tort claims have been joined with constitutional tort claims in a host of recent cases, including *Dellums v. Powell*, *supra* note 16, at 7-9; *Carter v. Carlson*, 144 U.S.App.D.C. 388, 392-393, 447 F.2d 358, 362-363 (1971), *rev'd on other grounds*, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973); *David v. Cohen*, *supra* note 5, 132 U.S.App.D.C. at 335, 407 F.2d at 1270; *Paton v. La Prade*, *supra* note 13, 524 F.2d at 866; *Roberts v. Williams*, 456 F.2d 819, 828-829 (5th Cir.), *cert. denied*, 404 U.S. 866, 92 S.Ct. 83, 30 L.Ed.2d 110 (1971); *Williams v. Gorton*, 529 F.2d 668, 670-671 (9th Cir. 1976); *Norton v. Turner*, *supra* note 16, 427 F.Supp. at 140. See also *Pierson v. Ray*, *supra* note 7.

mon law claims his *Barr* immunity, but the travail of litigation—which that immunity is designed to spare him—largely remains since he still has the burden of defending on the constitutional claim, albeit on the basis of qualified privilege. Friction with *Barr* runs even deeper, since the same commonsense assumption that underlies its holding suggests that far-sighted officials will guard against vexatious litigation rooted in the Constitution. One may thus question how much their resoluteness in job performance will be bolstered by *Barr*'s assurance of absolute immunity, which protects them only from the same annoyance couched in the principles of the common law.

That constitutional rights have a status in our jurisprudence which common law rights can never attain does not satisfactorily explain the line presently drawn.¹⁸ If its justification lies in our greater willingness to risk exposure of public servants to personal liability when vindicating constitutional rights than in enforcing more pedestrian legal norms, one may wonder whether absolute immunity ought ever to be conferred in constitutional tort actions, as indeed it sometimes is.¹⁹ One may also suspect that in such actions, no less than in Section 1983 suits, the constitutional origins of the plaintiff's claim may be less efficacious than the historical stature of particular immunities in the determination of whether the protection from suit is to be qualified or absolute.²⁰

¹⁸ Cf. K. Davis, *Administrative Law of the Seventies*, *supra* note 5, § 26.00-2 at 583-584 ("the court should not have to say yes or no to such questions as whether one has a constitutional right not to be shot at by an officer, not to be hit in the jaw with an officer's fist, not to have one's property damaged by an officer, not to have one's privacy invaded, not to have one's reputation sullied") (emphasis in original).

¹⁹ See, e.g., *Apton v. Wilson*, *supra* note 13, 165 U.S.App.D.C. at 29-33, 506 F.2d at 90-93.

²⁰ See, e.g., *Imbler v. Pachtman*, *supra* note 7, 424 U.S. at 417-429, 96 S.Ct. at 988-994, 47 L.Ed.2d at 136-143; *Scheuer*

I speak to these matters to acknowledge a dilemma, and not in any endeavor to orchestrate the field of public-servant liability, in which the Supreme Court occupies by far the major role. It may be that further enlightenment will come from the Court's forthcoming *Economou* decision.²¹ In any event, my bounden duty at the moment is to follow *Barr*, in my view without any effort at reexamination of its holding or its rationale. For "[s]ave only for the exceptional cases where the proper decisional result is very clear, it is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since."²²

v. Rhodes, *supra* note 7, 416 U.S. at 239-247, 94 S.Ct. at 1687-1692, 40 L.Ed.2d at 98-103; *Apton v. Wilson*, *supra* note 13, 165 U.S.App.D.C. at 29-30, 506 F.2d at 90-91.

²¹ *Economou v. United States Dep't of Agriculture*, *supra* note 15.

²² *Breakefield v. District of Columbia*, 143 U.S.App.D.C. 203, 206, 442 F.2d 1227, 1230 (1970), *cert. denied*, 401 U.S. 909, 91 S.Ct. 871, 27 L.Ed.2d 807 (1971).

WILKEY, *Circuit Judge* (concurring *dubitante*): While I concur in the judgment of this court, I do so with serious doubts about the present validity of *Barr v. Matteo*,¹ the Supreme Court decision that the majority views as controlling on the question of executive immunity. For the reasons stated by the majority and amplified by my discussion in Part I, *infra*, I do not doubt that the absolute immunity afforded by *Barr v. Matteo* represents sound policy, as much now as it did when it was decided. However, in the various § 1983 cases that have intervened since *Barr*, the Supreme Court appears to have described the immunity generally available to executive officials in *common law* actions as being only a qualified immunity. As I will explain more fully below in Part II, *infra*, the Court's persistence in this description, set out first in *Scheuer v. Rhodes*,² and ratified twice thereafter,³ leads me to doubt whether the Court is still committed to the absolute immunity of *Barr*. Since it is the Court's prerogative to overrule its own decisions, if it wishes, I join, although *dubitante*, in the judgment of this court in reliance upon *Barr*.⁴

¹ 360 U.S. 564 (1959).

² 416 U.S. 232 (1974).

³ *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Wood v. Strickland*, 420 U.S. 308 (1975).

⁴ As the majority opinion explains, *op. at* 2-3 n.2, the panel had remanded the question of official immunity to the trial court for its choice between absolute and qualified immunity, a choice to be determined by an individualized balancing of relevant factors. The remand directed by the panel was based upon a reading of the Supreme Court cases, particularly *Barr*, as requiring such an individualized balancing. Upon further study and reflection, however, I am now of the view that the balancing engaged in by the Supreme Court was aimed at formulating rules of immunity for categories of officials, as defined by function. The Court's inquiry into the facts of each case has typically, as in *Barr*, been for purposes of deciding

I

At first exposure the doctrine of absolute immunity for government officials in common law tort actions appears to be a harsh doctrine indeed. Someone who has incontestably been hurt as a result of the tortious conduct of a government official may be denied any compensation, regardless of the magnitude of the injury. Similarly, no matter how malicious an official's action may appear to be, the operation of absolute immunity may preclude inquiry in a civil suit for damages into the reasonableness of his behavior, even if it appears that there will be no review of his action by other means. In terms of compensation denied and accountability foreclosed, absolute immunity may often seem distasteful in its rigidity. For these and other reasons, well-respected commentators have called for an overruling of *Barr*, so that for common law torts as is already the case for constitu-

whether the official in question was acting within the scope of his authority and not for purposes of making an *ad hoc* balancing as to the appropriate immunity for that official alone. *Barr*, in other words, was establishing the rule that executive officials at all levels were to be accorded absolute immunity from civil suit for all actions of a discretionary nature within "the outer perimeter" of the officials' "line of duty." 360 U.S. at 575.

In restudying *Barr* and the intervening § 1983 cases, however, I have also come to the view that the language and the logic of the recent cases puts the present validity of *Barr* into doubt, even as to common law torts. Particularly since the Supreme Court will have occasion next Term in *Economou v. U.S. Dept. of Agriculture*, 535 F.2d 688 (2d Cir.), cert. granted sub. nom., *Butz v. Economou*, 429 U.S. 1089 (1977), to reconsider *Barr*, I feel obliged to express my doubts, although, as noted, my view is that the *Barr* rule represents sound policy.

tional torts executive officials will have only a qualified immunity.⁵

Recognizing that the rule of absolute immunity imposes real costs, the relevant question becomes whether the benefits to be derived from the doctrine justify these costs. The *Barr* Court openly confronted this question and decided that the contribution of absolute immunity to "the effective functioning of government" outweighed the loss of litigant rights.⁶ As Justice Harlan concluded:

To be sure, as with any rule of law which attempts to reconcile fundamentally antagonistic social policies, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good.⁷

Critical to the balance struck by *Barr* was the view that the threat of personal liability hanging over an indi-

⁵ Professor Davis, for example, looks for "an early overruling" of *Barr*, citing as "undesirable" and "[un]workable" the distinction between the absolute immunity of *Barr* for common law torts and the qualified immunity of *Scheuer v. Rhodes*, 416 U.S. 232 (1974) for "constitutional" torts. Davis, *Administrative Law of the Seventies*, § 26.00-2 at 584 (1976). In a concurring opinion in this case, slip op. at 6, Judge Robinson also explains and criticizes the "incongruity between immunities available to the same officer exercising the same functions," turning only on whether the tort he commits is characterized as constitutional or common law, although Judge Robinson refrains from suggesting that *Barr* be overruled. See also Vaughn, *The Personal Accountability of Public Employees*, 25 Am.U.L.Rev. 85 (1975), quoting Aeschylus: "For what mortal is righteous if he nothing fear?"

⁶ 360 U.S. at 573. As Judge Leventhal notes, maj. op. at 3 n.4, Justice Harlan's reasoning about absolute immunity won the support of a majority although his opinion was for a plurality of the Court.

⁷ *Id.* at 576.

vidual officer "might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."⁸ As Judge Leventhal has pointed out, it is as much a concern today that the possibility of personal liability will "chill" forthright government administration as it was in 1959, the year of *Barr*. If anything, with government regulation touching many more aspects of American life and with the stakes of regulation correspondingly more significant, there is even more reason today to expect "counter-attacks," in Judge Leventhal's phrase, against the officials who are charged with making the difficult and sensitive decisions of administration.

It is argued, however, that precisely because so much can turn upon the actions of executive officials, then there must be civil damage suits available in order to hold them accountable for their conduct.⁹ To begin with,

⁸ *Id.* at 571.

⁹ This argument has been made most forceably with regard to the abuse of basic civil liberties by government officials. Dean Prosser contends, for example, that:

it may seriously be questioned whether the removal of the possible deterrent effect of the individual's tort liability, at least for oppressive and outrageous conduct, would be at all a desirable thing. There once was a disreputable character named John Wilkes, whose newspaper was raided and put out of business, his premises illegally searched, and his property seized and confiscated, all for the worst kind of political motives. The tort actions which arose out of this high-handed piece of oppression were long regarded as a major blow struck for the freedom of the individual against the abuse of governmental power; and so long as cheap and conniving politicians continue to abuse that power, they should not be forgotten.

Prosser, *The Law of Torts*, § 132 at 992 (4th ed. 1971). In line with this plea, the availability of § 1983 and *Bivens*-type relief against most classes of officials for violations of constitutional rights does provide a special check on abuses of "our most cherished liberties." *Apton v. Wilson*, 506 F.2d 83 (D.C. Cir. 1974).

however, many of the actions by federal executive officials, which may give rise to common law torts, are subject to review and correction by courts under the Administrative Procedure Act and other statutory review provisions. In addition, the conduct of executive officials may be subject to a wide range of alternative oversight—by the press, by Congress, by the public, and by internal agency personnel. And, of course, the absolute tort immunity of *Barr* does not foreclose any possible criminal prosecutions of government officials who violate the law.¹⁰

If it is thought that these possible methods of oversight are still inadequate to assure full and fair accountability—and on occasion misbehavior by executive officials surely does go unchecked—it is not easy to know what courts should do about it. One possibility is that absolute or qualified immunity might turn on an assessment by a court in each case whether the allegedly tortious action of the officer was indeed subject to review or scrutiny by other means or in another forum. If not, then the civil damage suit can be allowed to proceed, with the award of only a qualified immunity, so that the officer will be called to answer for his conduct.

In my estimation this is an unwise and unworkable approach. An assessment of whether alleged misbehavior has been "adequately" reviewed and/or corrected by other means may often have to involve further proceedings and factual findings, a possibility which undercuts the purpose of absolute immunity, as expressed in *Imbler v. Pachtman*,¹¹ to provide protection at the outset from trial and liability. Moreover, a variable criteria such as this adds a further element of judgment and uncertainty to the process of choice between immunities, thereby importing the "chilling" effect of possible liability.

¹⁰ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

¹¹ *Id.* at 419 n.13.

How does a trial court assess, for example, the fact that there was no "official" disciplinary inquiry into alleged wrongdoing? What if this is because the various supervisors believed on the record before them that no wrongdoing had taken place and that the challenged conduct was justified? I suggest, in brief, that it is inappropriate to immunity doctrine, and inconsistent with Supreme Court practice,¹² to have absolute immunity awarded or taken away depending on whether there was, as seen in retrospect, alternative review of the incident in question.

In terms of assuring accountability, then, the other alternative is to drop absolute immunity for common law torts altogether, so that the reasonableness of every official action can be tested. Yet this need not involve a direct legal action against the executive official personally. And, as noted earlier, because this net of civil liability is so wide, and will entrap the innocent official along with the guilty, the policy preference has been for absolute immunity instead, which—ideally—encourages executive officials to act in a fearless, public-spirited way without the risk of immense personal liability. It seems to me that if the balance struck by *Barr* is deemed unsatisfactory, then the response should be legislative—the waiver of sovereign immunity for intentional torts.

If the complaint is that it is very unjust that there are uncompensated injuries from common law torts, then the preferable solution is to amend the Federal Tort Claims Act to cover intentional torts, like libel and slander, which are presently excluded.¹³ Surely in terms of realistic compensation, this change would provide a more effective remedy than the abandonment of absolute

¹² In *Imbler*, for example, the Court considered the "amenability" of prosecutors as a class as a factor weighing for absolute immunity but did not inquire into whether *that* prosecutor in particular was the subject of an official inquiry into his alleged misconduct. *Id.* at 429.

¹³ 28 U.S.C. § 2680 (h), as amended.

immunity, leaving monetary relief only against the officer. Similarly, if the complaint is that absolute immunity is resulting in a widespread unaccountability for common law torts, the preferable solution again may be to amend the Torts Claims Act to cover intentional torts. With regard to intentional torts, such as abuses by police officers, for example, it has often been thought that the imposition of judgments on governmental units may induce the higher officials to see that there is better training in the avoidance of wrongdoing and more effective oversight on the charges of misconduct.¹⁴

Indeed, with further changes in the Torts Claims Act, the government could secure the power, if it wished, to collect from the wrongdoing officer for malicious or egregious torts. This approach, if fairly and consistently administered, could bring a greater measure of accountability for the individual wrongdoer without imposing the degree of "chill" expected from the abandonment of absolute immunity. For with a waiver of sovereign immunity for intentional torts, the officer knows that the government will assume whatever judgment may ensue from an uncertain trial on liability and damages. Per-

¹⁴ In urging Congress to assume liability for the Fourth Amendment torts of federal officers, Chief Justice Burger noted with respect to private security guards that, "[d]amage verdicts for such acts are often sufficient in size to provide an effective deterrent and stimulate employers to corrective action." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 422 n.5 (1971) (dissenting opinion). This rationale has also been suggested as a reason for implying a *Bivens*-type cause of action directly against municipalities under the Fourteenth Amendment, Note, *Damage Remedies Against Municipalities For Constitutional Violations*, 89 Harv.L.Rev. 922, 927 (1976): "The threat of monetary judgments against governmental units may . . . spur higher officials to design their hiring and training programs, disciplinary procedures, and internal rules so as to curb misconduct." See also Davis, *Administrative Law Treatise*, 1970 Supplement, § 25.17 at 864-65.

sonal liability, the primary source of the "chill" upon the exercise of unintimidated discretion, would depend instead upon a disciplinary screening *by the government* about when to pursue recovery from the officer and about how much recovery to seek. Presumably this screening will be less unpredictable and capricious than present trial and jury outcomes against an officer and would thus provide a more fine-tuned way of holding accountable those who maliciously abuse their power.

Motivated by some of the considerations suggested above, Congress has already changed the Tort Claims Act so as to make the federal government financially responsible for the intentional torts of some of its officers. With a 1974 amendment sovereign immunity was waived for claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution" which are committed by United States "investigative or law enforcement officers."¹⁵ Whether Congress should further amend the Tort Claims Act to include the intentional torts of other officers, many of which would be common law torts, remains, of course, a matter of legislative judgment. Similarly, whether coverage of intentional torts by the government should include a right to seek indemnity from the officers involved also calls for an exercise of judgment by the legislature.¹⁶

¹⁵ 28 U.S.C. § 2680 (h), as amended 16 Mar. 1974, Pub.L. 93-253, § 2, 88 Stat. 50.

In connection with the availability of compensation, as mentioned above, the Senate Report stated: "Of course, Federal agents are usually judgment proof so this [a cause of action against the individual officer] is a rather hollow remedy." S. Rep. No. 588, 93rd Cong., 1st Sess. 3, reprinted in [1974] U.S. Code Cong. & Ad. News 2789, 2790.

¹⁶ Cf. *United States v. Gilman*, 347 U.S. 507 (1954). Even though the common law rule is that an employer can generally recover from an employee, a unanimous Supreme Court held in *Gilman* that the government could not recover from an

Recognizing the responsibility of Congress for the basic structure of the Tort Claims Act, I am unwilling to drop the absolute immunity of *Barr*, thereby leaving federal executive officials with only a qualified immunity for common law torts, in an effort to induce Congress to make further amendments to the Torts Claims Act. *Barr* has been rightly viewed as an aid to effective government and because its abandonment would thus impair public-spirited administration by the executive branch, its absolute immunity should be retained until a workable substitute, such as a waiver of sovereign immunity, is in place.

II

In 1959 *Barr v. Matteo*¹⁷ established the rule of federal common law that executive officials at all levels were entitled to absolute immunity from civil damage suits for those torts which involved action of a discretionary nature and which were taken within the scope of their authority. Over the years the Supreme Court appears to have adhered to the *Barr* rule¹⁸ and, most notably, in 1973, did "not disturb the judgment"¹⁹ of a lower court,

employee after it had been held liable under the Federal Tort Claims Act for the employee's negligent act. Emphasizing that it was for Congress to formulate its policies towards employees under the Tort Claims Act, the Court declined to impose its own solution on what it viewed as a complex and significant issue.

¹⁷ 360 U.S. 564.

¹⁸ In *Wheeldin v. Wheeler*, 373 U.S. 647, 650-51 (1963), for example, the Court found *Barr* inapplicable because the official was not acting within the scope of his authority, with no question as to *Barr*'s acceptance.

¹⁹ *Doe v. McMillan*, 412 U.S. 306, 327 n.15 (1973), *aff'g* in relevant part, *Doe v. McMillan*, 459 F.2d 1304, 1316-1319 (D.C. Cir. 1972). With regard to other nonlegislative officials the Supreme Court found no independent absolute immunity but did so in a manner consistent with *Barr*. In an examination

which had found absolute immunity under *Barr* for federal officials performing discretionary acts within their duty. In three subsequent immunity cases under § 1983, the Court, however, appears to have described the common law for executive officials as affording only a qualified immunity, even as to common law torts. With no clear indication that the Court was only describing state common law as opposed to federal common law, I am concerned about whether this undercuts the *Barr* rule and feel obliged to explain my doubts. Because of the ambiguity inhering in the Court's recent approach, it becomes necessary to trace in some detail its description of the common law.

In 1974, *Scheuer v. Rhodes*²⁰ presented the question of whether there should be absolute or qualified immunity in a suit for damages under § 1983 for the Governor and other high officials of a state, the president of a state university and members of the state National Guard. Noting that § 1983 was meant to give a remedy to parties deprived of their constitutional rights, the Court also repeated that § 1983 did not mean "to abolish wholesale all common law immunities."²¹ With this suggestion that the common law would be a helpful guide in structuring immunities under § 1983, the Court turned to a review of its three past determinations. In 1951 the Court had recognized absolute immunity for state legislators, noting the history of the absolute immunity at

of the challenged actions of the Public Printer and the Superintendent of Documents, the Court found that their actions, although authorized, involved the exercise of no significant discretion, thus taking them outside the ambit of *Barr*. See *Doe v. McMillan*, — F.2d — (D.C. Cir. 29 July 1977) (on remand).

²⁰ 416 U.S. 232.

²¹ *Id.* at 243, quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

common law, *Tenney v. Brandhove*.²² Similarly in 1967 the Court had afforded absolute immunity to state judges sued under § 1983, again noting the absolute immunity of the common law, *Pierson v. Ray*.²³ Lastly, in its review, the *Scheuer* Court came to the other class of officials involved in *Pierson*—local police officers. Noting that the common law had not granted them an absolute immunity, *Pierson v. Ray*²⁴ made available to them "the defense of good faith and probable cause."

At this juncture in *Scheuer* one expects the Court to state next: 1) what the immunity at common law would be for executive officials like these, charged with some analogous tort, like wrongful death, and 2) whether that common law immunity, be it absolute or qualified, will be carried over, for whatever policy reasons, into § 1983 actions. This was essentially the analysis embodied in *Tenney* and *Pierson* and was expressly the analysis employed in the later cases of *Wood v. Strickland*²⁵ and *Imbler v. Pachtman*,²⁶ which also transplanted their respective common law immunities. But the paragraphs that one next expects in *Scheuer* are not there; instead, there are the next two sentences:

When a court evaluates police conduct relating to an arrest its guideline is "good faith and probable cause." [*Pierson*] In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite.²⁷

²² 341 U.S. 367.

²³ 386 U.S. 547.

²⁴ *Id.* at 557.

²⁵ 420 U.S. 308, 318 (1975).

²⁶ 424 U.S. 409, 424 (1976).

²⁷ *Scheuer*, *supra* at 245-46.

What these sentences suggest is that the *Scheuer* Court had already decided, without setting out its customary analysis, that only qualified immunity would be available. In other words, the first sentence repeated from *Pierson* that a qualified immunity means that a court should inquire into whether a police officer made an arrest with "good faith and probable cause." The phrase—"the inquiry"—in the second sentence thus referred to what a court should inquire into in determining whether "higher officers of the executive branch" also have satisfied the reasonableness standard of qualified immunity. In the remainder of the long paragraph begun with these sentences the Court essentially established that in applying qualified immunity to higher officers of the executive branch a court must be very sensitive to the demands of their office, e.g., the occasional need for prompt decisive action and the obvious need to rely on facts supplied by others. The Court also emphasized that because the options of these high officials may be so broad and so subtle, their "range of discretion" for purposes of immunity had to be read very widely.²⁸ *Scheuer* concluded from these considerations that the qualified immunity available to officers of the executive branch of government had to vary in scope, "the variation being dependent on the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."²⁹ In sum, then, it appears that the

²⁸ *Id.* at 247. At this point, *Scheuer* quotes Justice Harlan's counsel from *Barr* that the scope of discretion must be tailored to the broad or narrow duties of executive officers at different levels. Contrary to the majority's characterization, op. at 7-8, this is not a citation of *Barr* for the proposition that there must be absolute immunity for executive discretionary acts in the context of defamation actions. As will be developed, *infra*, the *Scheuer* Court appeared to consider qualified immunity as the common law protection available to executive officers.

²⁹ *Scheuer*, *supra* at 247.

focus of the Court's attention in *Scheuer* was upon an appropriate definition of qualified immunity;³⁰ the choice between immunities appears to have been made with little discussion and without the systematic approach found in similar cases."

In the various restatements of *Scheuer*, however, the Court has described that decision in terms of its usual systematic approach, thereby casting some light on what it considered as the common law tradition for the immunity of executive officers. In *Wood v. Strickland*,³¹ the Court said that it had granted a qualified immunity to the *Scheuer* defendants, "under prior precedent and in light of the obvious need to avoid discouraging effective official action by public officials charged with a considerable range of responsibility and discretion. . . ." After quoting *Scheuer's* formulation of qualified immunity, *Wood* continued:

Common-law tradition, recognized in our prior decisions, and strong public-policy reasons also lead to a construction of § 1983 extending a qualified good-

³⁰ It is noteworthy that at this stage of the case the threshold issues of scope of authority and discretionary action still remained for decision on remand, in addition to the major issue of the reasonableness and good faith of the alleged constitutional violations. See *id.* at 250.

³¹ Before closing the discussion of immunities the Court stated that "[u]nder the criteria developed by precedents of this Court, § 1983 would be drained of all meaning were we to hold that the acts of a governor or other high executive officer . . ." were entitled to absolute immunity. *Id.* at 248. The meaning of this is not clear, for twice before the Court had granted absolute immunity to two classes of state officials, legislators and judges, in significant part because of their absolute immunity at common law. If the Court had regarded high executive officials as also having an absolute immunity at common law, it may well have comported with the precedents of § 1983 to have continued their absolute immunity here.

³² 420 U.S. at 317-18 (emphasis added).

faith immunity to school board members from liability for damages under that section.³³

The implication from both of these quoted sentences is that the *Scheuer* outcome of qualified immunity for executive officers accorded with common law precedent.

The next immunity case, *Imbler v. Pachtman*, *supra*, described *Scheuer* in similar terms. After stating that "the Governor and other executive officials of a State" had only a qualified immunity under *Scheuer* for § 1983 suits, *Imbler* characterized that process of choice between immunities as follows:

In *Scheuer* and in *Wood*, as in the two earlier cases, [*Tenney* and *Pierson*], the considerations underlying the nature of the immunity of the respective officials in suits at common law led to essentially the same immunity under § 1983. See 420 U.S., at 318-321; 416 U.S. at 239-247, and n.4.³⁴

Here, even more clearly than in *Wood*, the *Imbler* Court appears to be saying that the executive officials in *Scheuer* would have been entitled to only a qualified immunity at common law. What is the support for this that the Court finds in its citations back to *Scheuer*? As already noted, from the point in *Scheuer* when the Court puts the question as to these executive officials (p. 242) through the close of the analysis (p. 247) there is no indication of what the immunity of executive officials would be at common law. *Imbler* must be drawing its conclusion, then, from the earlier pages of general discussion (239-242) and from n.4, which are the portions specifically cited (see quote above). In the text of *Scheuer* at 239, official immunity is said to derive from the same considerations that generated sovereign immunity. *Scheuer* continues: "While the latter doctrine—that the 'King can do no wrong'—did not protect all

³³ *Id.* at 318 (emphasis added).

³⁴ *Imbler*, *supra* at 419.

government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability." Attached to that last sentence is the cited footnote 4, which described the structure of official immunity at common law. Due to its significance I have set out the entire note as follows:

*In England legislative immunity was secured after a long struggle, by the Bill of Rights of 1689: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," 1 W. & M., Sess. 2, c. 2. See *Stockdale v. Hansard*, 9 Ad. & E., 1, 113-114, 112 Eng. Rep. 1112, 1155-1156 (Q. B. 1839). The English experience, of course, guided the drafters of our "Speech or Debate" Clause. See *Tenney v. Brandhove*, 341 U. S. 367, 372-375 (1951); *United States v. Johnson*, 383 U. S. 169, 177-178, 181 (1966); *United States v. Brewster*, 408 U. S. 501 (1972).

In regard to judicial immunity, Holdsworth notes: "In the case of courts of record . . . it was held, certainly as early as Edward III's reign, that a litigant could not go behind the record, in order to make a judge civilly or criminally liable for an abuse of his jurisdiction." 6 W. Holdsworth. *A History of English Law* 235 (1927). The modern concept owes much to the elaboration and restatement of Coke and other judges of the sixteenth and early seventeenth centuries. *Id.*, at 234 *et seq.* See *Floyd v. Barker*, 12 Co. Rep. 23, 77 Eng. Rep. 1305 (K. B. 1607). The immunity of the Crown has traditionally been of a more limited nature. Officers of the Crown were at first insulated from responsibility since the King could claim the act as his own. This absolute insulation was gradually eroded. Statute of Westminster I, 3 Edw. 1, c. 24 (1275) (repealed); Statute of Westminster II, 13 Edw. 1, c. 13 (1285) (repealed). The development of liability, especially during the

times of the Tudors and Stuarts, was slow; see, *e. g.*, Public Officers Protection Act, 7 Jac. 1, c. 5 (1609) (repealed). With the accession of William and Mary, the liability of officers saw what Jaffe has termed "a most remarkable and significant extension" in *Ashby v. White*, 1 Bro. P. C. 62, 1 Eng. Rep. 417 (H. L. 1704), reversing 6 Mod. 45, 87 Eng. Rep. 808 (Q. B. 1703). Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 14 (1963); A. Dicey, *The Law of the Constitution* 193-194 (10th ed. 1959) (footnotes omitted). See generally *Barr v. Matteo*, 360 U. S. 564 (1959). Good-faith performance of a discretionary duty has remained, it seems, a defense. See Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 216 (1963). See also *Spalding v. Vilas*, 161 U. S. 483, 493 *et seq.* (1896).

The last two sentences of this footnote are of particular interest. With the reference to the significant extension of liability in 1704, the Court gives one the impression that since 1704, at least, "[t]he immunity of the Crown has traditionally been of a more limited nature," *supra*, than the absolute immunity described, *supra*, for legislators and judges. And then the Court confirms this impression with the last sentence: "Good-faith performance of a discretionary duty has remained, it seems, a defense." On the basis of these sentences, unqualified by any further language, it would appear, according to *Scheuer*, that the common law has evolved a rule of *qualified* immunity for executive officials as to all torts. If, moreover, *Scheuer* has described the common law as it applies to *federal* officials, then one wonders whether the absolute immunity of *Barr* retains all of its force.

It may be, as I will explore below, that footnote 4 was describing instead the state common law or some traditional, perhaps English, common law, which would then distinguish and leave intact the federal common law of *Barr*. These must, of necessity, be real possibilities

because, as is obvious above, the footnote itself cites to *Barr*, with apparent neutrality. For various reasons, however, it is not conclusive that footnote 4 was not describing federal common law. Thus, in my estimation, *Barr* is still put in doubt.

The first possibility is that the *Scheuer* Court was describing the evolution of English common law, apart from the American experience. Contributing to the possibility is the placement of the footnote—in a paragraph about the origins of official immunity—as well as its content—primarily about English cases and statutes. Yet it is not clear that the finishing stroke of the note, that good-faith immunity "remains" as the common law, is meant to pertain only to English law. Most significantly, Justice Powell, writing in *Imbler, supra*, cited expressly to "n.4" in support of the underlying proposition that the state executive officials had only a qualified immunity "in suits at common law."³⁵

The other possibility, then, is that the Court meant to describe the state common law in its finishing statement of note 4, perhaps in addition to summing up the evolution of British law. Supporting this possibility is the analysis of *Wood v. Strickland*³⁶ where the inquiry into common law immunity was into what "state courts have generally recognized . . . under state law." On the other hand, *Pierson v. Ray*³⁷ directed that the search for the common law immunity be for "the prevailing view in this country," which would presumably take into account the federal common law. And, most recently, *Imbler v. Pacht-*

³⁵ See text at n.34, *supra*. In addition, in the law review article cited to accompany the last sentence of footnote 4, Professor Jaffe was discussing official immunity in general, with particular attention to *this* country.

³⁶ 420 U.S. at 318.

³⁷ 386 U.S. at 547.

man³⁸ considered both the "majority rule" of the state cases as well as its own view of the federal common law, citing *Yaselli v. Goff*.³⁹

One initial conclusion to draw from these cases is that the Court does not look to the particular common law of the defendant's state as the starting point.⁴⁰ State law is consulted in order to find the more settled common law, but even the majority state view is tempered by the federal common law, which is deserving of its own weight. From these sources the Court distills the common law "tradition," which it then decides whether or not to carry over to § 1983.

Footnote 4, then, was drawing upon, or including, federal common law, i.e., *Barr v. Matteo*, in describing the immunity for executive officials as qualified. And, according to Professor Jaffe, whose articles were cited in *Scheuer*⁴¹ as important sources, *Barr* had to be considered as the "leading case in the field" extending absolute immunity to executives below Cabinet rank.⁴² While the *Barr* rule may not have been accepted by the majority of states,⁴³ it was still, as noted, a leading case to assess in distilling the common law for purposes of § 1983 analysis. It may have been that *Scheuer* meant

³⁸ 424 U.S. at 422.

³⁹ 12 F.2d 396, *aff'd*, 275 U.S. 503 (1927) (per curiam).

⁴⁰ *Scheuer*, for example, did not consider the state law of Ohio or even say what it was. Were it otherwise, the § 1983 immunity might vary from state to state for the same class of officials, surely an inappropriate outcome for a federal cause of action. See *Fidtler v. Rundle*, 497 F.2d 794, 799-800 (3rd Cir. 1974).

⁴¹ 416 U.S. at 240 nn. 4 and 5.

⁴² Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv.L.Rev. 209, 234 (1963).

⁴³ Prosser, *Law of Torts*, § 132 at 989 (4th ed. 1971).

to leave *Barr* entirely intact, as an untraditional, minority view. Footnote 4, after all, cannot be read with complete literalness; it surely did not intend, for example, to suggest that *Spalding v. Vilas*⁴⁴ was no longer the common law.⁴⁵

Yet in *Scheuer*'s description of the common law as affording only a qualified immunity, at least as to inferior executive officers, I cannot safely assume that the Court was not reflecting some doubt about *Barr*. If the Court had said there, or in the later cases, that the common law tradition in *Scheuer* was based upon the majority state view, then *Barr*, in my estimation, could be applied with no hesitation. But with *Barr*'s present status unsettled, I can concur only *dubitante*.

⁴⁴ 161 U.S. 483 (1896). *Spalding* held that a Cabinet official had absolute immunity for torts arising out of his official communications.

⁴⁵ Elsewhere in *Scheuer*, *Spalding* is quoted with apparent approval. 416 U.S. at 242 n.7 & 246 n.8. Moreover, Justice White, concurring in *Imbler*, said that *Scheuer* granted only a qualified immunity, "this notwithstanding the fact that, at least with respect to high executive officers, absolute immunity from suit for damages would have applied at common law. *Spalding v. Vilas*, 161 U.S. 483 (1896); *Alzua v. Johnson*, 231 U.S. 106 (1913)." *Imbler*, *supra* at 434.

FEB 25 1978

MICHAEL RODAK, JR., CLERK

No. 76-418

In the Supreme Court of the United States

OCTOBER TERM, 1977

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.,
AND NORMAN SCOTT, PETITIONERS

v.

SMITHSONIAN INSTITUTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

BRIEF FOR THE RESPONDENTS

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AND NORMAN SCOTT, PETITIONERS

v.

SMITHSONIAN INSTITUTION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals, *en banc* (Supp. Pet. App. 49a-99a), is reported at 566 F. 2d 289. An earlier opinion of the court of appeals reversing the district court's denial of petitioners' motion to vacate and reenter summary judgment for defendants is reported at 500 F. 2d 808.

JURISDICTION

The original judgment of the court of appeals was entered on June 28, 1976. That judgment was vacated, and a new judgment was entered by the court, *en*

(1)

banc, on September 16, 1977. The original petition for a writ of certiorari was filed on September 22, 1976. A supplement to the petition was filed on November 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals lacked jurisdiction over the appeal because petitioners failed to file a timely notice of appeal.

2. Whether federal government officials have an absolute rather than a qualified immunity in a libel action seeking damages from them personally for acts done in the performance of their official duties.

3. Whether the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, bars damage suits for libel against the Smithsonian Institution.

STATUTES AND RULES INVOLVED

Pertinent statutes and rules are reproduced in the appendix, pp. 1A-7A, *infra*.

STATEMENT

Petitioners, a corporation and its principal stockholder, seek review of an *en banc* decision of the Court of Appeals for the District of Columbia Circuit, holding that the district court properly dismissed a libel action against the Smithsonian Institution and its officers sued in their official capacity, and that respondent Evans, an employee of the Smithsonian sued personally, was entitled to assert a defense of absolute immunity. The court remanded the

case for further proceedings to determine whether Evans was acting within the scope of his employment.

In February and March of 1970, the Smithsonian Institution received two inquiries from officials of the Colombian National Ministry of Education inquiring about the responsibility and scientific competence of petitioners with regard to underwater archeological explorations that the Colombian government contemplated. The first communication was sent by two officials of the Colombian Cultural Institute to the Director of the Smithsonian Institution. Court of Appeals App. 17. The second letter was from Professor Alicia Dussan de Reichel, the Chief of the Division of Museums and Restoration of the Colombian Cultural Institute, to Dr. Betty Meggers, a research associate at the Department of Anthropology of the Smithsonian's Museum of Natural History. Court of Appeals App. 14-15.

On March 11, 1970, Dr. Clifford Evans, Jr., as chairman of the Department of Anthropology, sent a letter to Professor Dussan commenting upon the capabilities of the petitioners. Court of Appeals App. 18. The letter, which petitioners allege to be libelous, was critical of petitioners' scientific competence.

Petitioners filed suit in the United States District Court for the District of Columbia, seeking \$2,000,000 in damages from the Smithsonian Institution, three of the Institution's regents (Chief Justice Warren E. Burger, Vice President Spiro T. Agnew, and Senator J. William Fulbright) and Dr. Evans. Petitioners

sought damages from the defendant officials in their official capacity, as well as damages from Dr. Evans personally, for defamation based on the letter he sent.

The district court granted summary judgment for the Smithsonian Institution and the regents, concluding that the Federal Torts Claims Act expressly exempted them from suit for libel. The district court also granted summary judgment for Dr. Evans on the ground that, because he had made the statements within the scope of his duties as a Smithsonian employee, he was absolutely immune from suit (Pet. App. 45a).

The court of appeals affirmed the district court's decision regarding the Smithsonian and the regents, holding that 28 U.S.C. 2680(h) barred suits for libel against government agencies and that the Smithsonian is within that category (Pet. App. 2a-11a). With regard to the immunity defense raised by the individual defendant Evans, however, the panel remanded the case to the district court to determine whether Dr. Evans was entitled to absolute or qualified immunity (Pet. App. 11a-30a).

Reconsidering the case *en banc*, the court of appeals held that under *Barr v. Mateo*, 360 U.S. 564, Dr. Evans had absolute immunity for statements made within the scope of his duties as an Institution employee (Supp. Pet. App. 50a-59a). The court, however, remanded the case for a determination whether Evans was acting within the scope of his employment (Supp. Pet. App. 59a). With respect to the claim against the Smithsonian and the regents, the *en banc* court rein-

stated the portion of the original panel decision holding that the Tort Claims Act exempted them from suit for libel (Supp. Pet. App. 50a-51a, n. 2).

ARGUMENT

I. THE JURISDICTIONAL ISSUE

Although we have not raised the issue by cross-petition, we believe that the court of appeals was without jurisdiction over the appeal in this case because petitioners failed to file a timely notice of appeal from the district court's judgment. This Court has frequently addressed such jurisdictional questions even though they were not raised below or presented by the parties to this Court. See, *e.g.*, *Schlesinger v. Councilman*, 420 U.S. 738, 743; *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206; *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459. We submit, therefore, that the Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to that court with instructions to dismiss the appeal.

On January 17, 1972, the district court entered an order granting summary judgment in favor of respondents (Pet. App. 45a). Petitioners apparently did not learn of the order until November 20, 1972, when it was revealed during a conversation with the trial judge's clerk. On December 4, 1972, petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate and re-enter the summary judgment in order to preserve their right to appeal.

Respondents did not oppose the motion. The district court denied the motion on December 19, 1972, and petitioners appealed. 500 F. 2d at 809.

The court of appeals reversed the decision of the trial court on June 26, 1974, holding that a "trial court may vacate and re-enter a judgment under Rule 60(b) to allow a timely appeal when neither party had actual notice of the entry of judgment, when the winning party is not prejudiced by the appeal, and when the losing party moves to vacate the judgment within a reasonable time after he learns of its entry" (500 F. 2d at 810). The district court then vacated its earlier judgment and entered a new one on July 31, 1974. Petitioner filed a notice of appeal from that judgment on August 16, 1974.

A timely notice of appeal is "mandatory and jurisdictional" under Rule 4(a) of the Federal Rules of Appellate Procedure and 28 U.S.C. 2107. *United States v. Robinson*, 361 U.S. 220, 229.¹ Because the government is a party in this case, petitioners' notice of appeal should have been filed within 60 days of the entry of summary judgment, that is, by March 18, 1972. Petitioners' notice of appeal was filed on August 16, 1974, well beyond the 60-day appeal period and any 30-day extension that might have been granted for "excusable neglect." 28 U.S.C. 2107; Rule 4(a), Fed.R.App.P.

¹ The importance of Rule 4(a) in setting a "definite point of time when litigation shall be at an end * * *" was reaffirmed in *Browder v. Director, Department of Corrections of Illinois*, No. 76-5325, decided January 10, 1978, slip op. 7.

Thus, the court of appeals had jurisdiction over this case only if some rule permitted entry of a new judgment from which a timely appeal could be taken. Although the court of appeals found such authority in Rule 60(b), Fed.R.Civ.P., relief under that rule may not be obtained merely because the district court clerk fails to comply with the mandate in Rule 77(d), Fed.R.Civ.P., "[i]mmmediately upon the entry of an order or judgment * * * [to] serve a notice of the entry by mail * * *."

After this Court's decision in *Hill v. Hawes*, 320 U.S. 520, sustaining the district court's power itself to do what the court of appeals directed it to do here, Rule 77(d) was amended to deal with this precise situation.² The 1946 amendments added the following

² In clarifying the intent of the amendment the Advisory Committee on Rules stated (Notes of Advisory Committee on 1946 Amendment to Fed.R.Civ.P. 77(d)):

"Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment."

sentence:

Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

That language makes clear that a motion to vacate and reenter a judgment under Rule 60(b) cannot properly be used to extend the time for appeal where a party has simply failed to learn of the entry of the judgment because of a Rule 77(d) violation. *In re Morrow*, 502 F. 2d 520 (C.A. 5); *Lathrop v. Oklahoma City Housing Authority*, 438 F. 2d 914 (C.A. 10); *Weedon v. Gaden*, 419 F. 2d 303, 307-308 (C.A. D.C.). As the Fifth Circuit has observed: "To permit an appeal where there is failure to notify, without more, would be opposed to the clear wording and intent of Rule 77(d)." *In re Morrow, supra*, 502 F. 2d at 523. See also *Klapprott v. United States*, 335 U.S. 601; *Ackermann v. United States*, 340 U.S. 193. In the present case, there are no unusual circumstances that would justify deviation from that rule. Compare *Smith v. Jackson Tool & Die, Inc.*, 426 F. 2d 5 (C.A. 5).

II. THE MERITS

1. Petitioners contend (Supp. Pet. 3-11) that government officials such as Dr. Evans have only a qualified, not an absolute, immunity from libel suits based on statements made within the ambit of their employment. For the reasons stated in our brief in *Butz v.*

Economou, No. 76-709,³ argued November 7, 1977, we believe that contention is foreclosed by this Court's decision in *Barr v. Matteo*, 360 U.S. 564. But since the decision in *Economou* may control that issue, the Court should defer acting on the petition pending that decision.⁴

2. Petitioners also challenge (Pet. 8-16) the court of appeals' holding that the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, bars damage suits for libel against the Smithsonian Institution and the regents. That decision is correct and does not warrant review by this Court.

a. The United States cannot be sued without its consent. See *United States v. Testan*, 424 U.S. 392, 399; *Dalehite v. United States*, 346 U.S. 15, 30. With regard to tort actions, Congress in 1946 enacted a comprehensive statutory scheme (the Federal Tort Claims Act), providing for selective waiver of the government's sovereign immunity in certain of such cases. By its terms the Act creates an exclusive remedy (28 U.S.C. 2679) against the United States for injuries wrongfully caused by any "employee of the Government," including officers and employees of "any federal agency" (28 U.S.C. 1346(b), 2671) and defines "[f]ederal agency" to include "* * * independent establish-

³ We are sending petitioners a copy of our brief in *Economou*.

⁴ The court of appeals remanded the case for a determination whether Dr. Evans was acting within the scope of his employment. Should the district court conclude that he was not, that would obviate any need for this Court to decide whether he is entitled to absolute immunity.

ments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States * * * ." 28 U.S.C. 2671. Congress also provided that the Act would not apply to specified categories of cases, including "[a]ny claim arising out of * * * libel * * * ." 28 U.S.C. 2680(h).

Although petitioners argue that the exception in Section 2680(h) means only that the preexisting common law remains in force, the court of appeals correctly concluded that "[Section] 2680(h) should be read as an affirmative grant of immunity to 'federal agencies' in the types of deliberate tort cases which it describes" (Supp. Pet. App. 66a). In *Dalehite v. United States*, 346 U.S. 15, this Court, applying the analogous exception in 28 U.S.C. 2680(a) for performance of discretionary functions, held that the legislative intent in enacting the Section 2680(a) exception was "to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity * * * ." 346 U.S. at 30. There is no reason to believe that Congress, when it "sought to systematize and centralize the immunity laws" (Supp. Pet. App. 66a), intended to preserve the possibility that federal agencies, while exempt from suits growing out of the exercise of discretionary functions, might nonetheless be subject to suits for libel. See also *Goddard v. District of Columbia Redevelopment Land Agency*, 287 F. 2d 343, 345 (C.A. D.C.), certiorari denied, 366 U.S. 910; *United States v. Delta Industries, Inc.*, 275 F.

Supp. 934, 936-937 (N.D. Ohio); *James v. Federal Deposit Insurance Corporation*, 231 F. Supp. 475, 477 (W.D. La.); *Freeling v. Federal Deposit Insurance Corporation*, 221 F. Supp. 955, 956-957 (W.D. Okla.).⁵

While the Smithsonian Institution was not immune from suit prior to the Tort Claims Act, the language and legislative history of the Act reveal a congressional intent to establish a uniform rule for all federal agencies. In Section 2679(a), therefore, Congress made clear that the Act is the exclusive remedy available to plaintiffs in money damage actions even though an agency elsewhere is authorized to be sued in its own right. Explaining 28 U.S.C. 2679(a), the reports of both chambers make the following statement:

This will place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies. In both cases, the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act, as for example, the Suits in Admiralty Act. It is intended that neither

⁵ Contrary to petitioners' assertion (Pet. 8-10), there is no conflict between the decision below and the decisions of other courts of appeals. In the cases cited by petitioners, suit was permitted against the United States, despite the fact that such suit fell within one of the exceptions of Section 2680, only because other statutes authorized the suit. See *Baker v. F&F Investment Co.* 489 F. 2d 829 (C.A. 7); *DeBardleben Marine Corp. v. United States*, 451 F. 2d 140 (C.A. 5).

corporate status nor 'sue and be sued' clauses shall, alone, be the basis for suits for money recovery sounding in tort. [H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 33-34 (1946).]

Thus, once it has been established that the defendant is a federal agency, there is no need for further inquiry into its status (Pet. App. 8a-9a).

b. The court of appeals correctly concluded (Supp. Pet. App. 62a-63a) that the Smithsonian Institution is a federal agency under the Tort Claims Act. As the court noted (Supp. Pet. App. 62a-63a), although the "Smithsonian has a substantial private dimension, * * * the nature of its function as a national museum and center of scholarship, coupled with the substantial governmental role in funding and oversight, make the institution an 'independent establishment of the United States,' within the 'federal agency' definition."

Moreover, the Smithsonian Institution is a corporation primarily acting as an instrumentality or agency of the United States within the meaning of that definition. Approximately 75 percent of the Institution's operating funds come from federal appropriations (General Hearings on Smithsonian Institution before the subcommittee on Library and Memorials of the House Committee on House Administration, 91st Cong., 2d Sess. 253, 321(1970) ("Hearings")). The vast majority of its employees are federal civil service employees rather than private employees. *Id.*

at 253. Eight of the 17 Regents of the Institution acquire their positions because they hold other high positions in the federal government. 20 U.S.C. 42.

The Institution is audited periodically by the General Accounting Office, a federal agency that is an arm of Congress. Hearings, *supra*, at 362-396. The original Smithsonian endowment is deposited in the United States Treasury and receives interest from the United States Government. 20 U.S.C. 54. Both Congress and the General Accounting Office carefully review the federal appropriation to the Smithsonian. 20 U.S.C. 49.⁶

In short, the substantial control of the United States over the Institution, the degree of federal funding, and the federal government's interest in "the increase and diffusion of knowledge among men * * *" demonstrate that the Smithsonian is a federal agency for purposes of the Tort Claims Act. Cf. *United States v. Orleans*, 425 U.S. 807; *Logue v. United States*, 412 U.S. 521.

⁶ See also 20 U.S.C. 57, 58, 79b, which impose restraints and limits of a varying nature on the utilization of funds by the Smithsonian.

Moreover, the language of the Smithsonian's enabling legislation (20 U.S.C. 41) is similar to the definition of "federal agency" in the Tort Claims Act, which includes "independent establishments of the United States." 20 U.S.C. 41 reads in pertinent part:

"The President, the Vice President, the Chief Justice, and the heads of executive departments are constituted an *establishment* by the name of the Smithsonian Institution for the increase and diffusion of knowledge among men * * *." (Emphasis added.)

⁷ 20 U.S.C. 41; see note 6, *supra*.

CONCLUSION

The Court should grant the petition, vacate the judgment of the court of appeals, and remand the case to that court with instructions to dismiss the appeal for want of jurisdiction. Alternatively, the Court should dispose of this case in light of its disposition of *Butz v. Economou*, No. 76-709.

Respectfully submitted.

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FEBRUARY 1978

APPENDIX

20 U.S.C. 41. INCORPORATION OF INSTITUTION

The President, the Vice-President, the Chief Justice, and the heads of executive departments are constituted an establishment by the name of the Smithsonian Institution for the increase and diffusion of knowledge among men, and by that name shall be known and have perpetual succession with the powers, limitations, and restrictions hereinafter contained, and no other.

28 U.S.C. 1346. UNITED STATES AS DEFENDANT

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * *

(b) Subject to the provisions of chapter 171 of this title [§§ 2671-2680 of this title], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2671. DEFINITIONS

As used in this chapter [§§ 2671-2680 of this title] and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C. 2679. EXCLUSIVENESS OF REMEDY

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

* * * *

28 U.S.C. 2680. EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute, or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * *

28 U.S.C. 2107. TIME FOR APPEAL TO COURT OF APPEALS

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within 30 days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be 60 days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within 90 days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within 15 days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

RULE 4(A), FEDERAL RULES OF APPELLATE PROCEDURE

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party, may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules:

(1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

RULE 60(B), FEDERAL RULES OF CIVIL PROCEDURE

RELIEF FROM JUDGMENT OR ORDER

* * * * *

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether

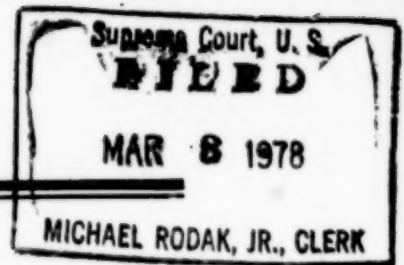
heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 77(D), FEDERAL RULES OF CIVIL PROCEDURE

* * * * *

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a

note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.



**IN THE
Supreme Court of the United States
OCTOBER TERM, 1977**

No. 76-418

**EXPEDITIONS UNLIMITED ACQUATIC
ENTERPRISES, INC.**

and

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Petitioners,

vs.

SMITHSONIAN INSTITUTION, et al.,

Respondents.

**PETITIONERS' REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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TO PETITION FOR WRIT OF CERTIORARI**

STATEMENT

On January 17, 1972, the District Court entered Summary Judgment in favor of Respondents, although no notice of the entry of judgment was given to any party. On November 20, 1972, Petitioner first learned of the entry of judgment. (Reply Appendix, at 2). On December 4, 1972, Petitioner filed a Motion to Vacate and Reenter the Judgment in order to preserve its right of appeal, which unopposed motion was denied on December 19, 1972. The Court of Appeals reversed on June 26, 1974. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 500 F.2d 808 (Reply Appendix, at 1-4). On July 31, 1974, the District Court vacated its order of January 17,

1972, and entered judgment in favor of Respondents. Notice of Appeal was filed on August 16, 1974.

REPLY ARGUMENT

The Jurisdictional Issue

Respondents raise in their Brief an issue which had been determined adversely to Respondents by the United States Court of Appeals for the District of Columbia Circuit on June 26, 1974, and had not been raised again until their response to the Petition for Writ of Certiorari. The issue is whether the Court of Appeals had jurisdiction to review the District Court's entry of Summary Judgment for defendants.

Pursuant to the mandate of the Court of Appeals, in their opinion of June 26, 1974, reproduced herein at Appendix 1-4, the District Court vacated its prior entry of judgment on July 31, 1974. It was that entry of judgment from which a Notice of Appeal was filed on August 16, 1974. Once vacated, the prior entry of judgment ceased to exist, and once entered, the judgment of July 31, 1974 was appealable.

Respondents state in their Brief that a motion under Rule 60(b) cannot be used to extend time for appeal "where a party has simply failed to learn of the entry of the judgment because of a Rule 77(d) violation," and that "[i]n the present case there are no unusual circumstances that would justify deviation from that rule." (Brief for the Respondents, at 8.) Their statements ignore the facts found by the Court of Appeals to justify such action in this case.¹

¹Two actions were filed between the parties on the same day. Reply Appendix, at 2. Neither party learned of the entry of judgment. *Id.* While engaged in discovery in the companion case, counsel discussed whether

Therefore should this court wish to consider the issue of jurisdiction of the Court of Appeals, it should grant certiorari and permit full briefing of this issue. In the cases cited by Respondents, *Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963); and *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1944), the jurisdictional issue was confronted only after full briefing. The same practice should be followed here.

CONCLUSION

The Court should grant the Petition and reject Respondents' jurisdictional argument as having been rendered moot by the District Court's vacation of the January 17, 1972 entry of judgment, and its subsequent entry of judgment on July 31, 1974. Alternatively, the jurisdictional issue should be considered after briefs are filed on the issues involved.

Respectfully submitted,

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there had been a decision. *Id.* Since neither party knew of the entry of judgment, there was no reliance upon it by Respondent, nor a "free calculated, deliberate" choice not to appeal by petition. *Id.* at 3, citing *Ackerman v. United States*, 340 U.S. 193, 198 (1950). The Respondents were not prejudiced by the Appeal and Petitioner filed a motion to vacate the prior decision within a reasonable time. *Id.* at 4.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1297

EXPEDITIONS UNLIMITED AQUATIC ENTERPRISES, INC.,
ET AL, APPELLANTS

v.

SMITHSONIAN INSTITUTION, ET AL

Appeal from the United States District Court
for the District of Columbia

Decided June 26, 1974

John J. Pyne, for appellant.

N. Richard Janis, Assistant United States Attorney with whom *Harold H. Titus, Jr.*, United States Attorney at the time the brief was filed, and *John A. Terry*, Assistant United States Attorney were on the brief, for appellee.

Before: *BAZELON*, Chief Judge, *LEVENTHAL*, Circuit Judge, and *SOLOMON*,* *United States District Judge* for the District of Oregon

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Per Curiam: Expeditions Unlimited Aquatic Enterprises, Inc., and Norman Scott (appellants) filed an action for libel against the Smithsonian Institution, its regents, and Clifford Evans (appellees) on January 8, 1971. On the same day another action between the same parties was filed. On March 12, 1971, appellees filed a motion to dismiss or in the alternative for summary judgment. On December 13, 1971, the parties filed their final briefs and the court took the motion under advisement.

On January 17, 1972, the court entered summary judgment for appellees. Neither the appellants nor the appellees learned of the entry of judgment. While engaged in discovery in the companion case, counsel for the parties periodically discussed whether there had been a decision on the motion in this case. On November 20, 1972, in a conversation with the trial judge's clerk, counsel for appellants first learned that the order granting summary judgment in favor of appellees had been entered more than ten months earlier.

On December 4, 1972, appellants filed a motion to vacate and re-enter the summary judgment in order to preserve their right to appeal. The appellees did not oppose the motion. Nevertheless, the court denied it without opinion on December 19, 1972. Appellants filed a timely appeal.

Rule 60(b)(6) of the Federal Rules of Civil Procedure allows a district court to relieve a party from a final judgment for "any . . . reason justifying relief from the operation of the judgment." This section "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949).

Here none of the parties knew of the judgment until ten months after it had been entered. The clerk did not notify the parties of the entry of judgment as required under Rule 77(d) of the Federal Rules of Civil Procedure, nor did the trial judge follow the usual practice of sending the parties copies of the opinion or order granting summary judgment. The motion to vacate and re-enter the judgment was filed only two weeks after appellants learned that the judgment had been entered.

We recognize that Rule 77(d) provides that the failure of the clerk to notify a party of the entry of judgment does not extend the time within which the party may appeal. This rule is intended to preserve the finality of judgments. If the parties do not know of the entry of judgment, the winning party cannot rely on the judgment and the losing party cannot make a "free, calculated, deliberate" choice not to appeal. *Ackermann v. United States*, 340 U.S. 193, 198 (1950). In these circumstances the purposes behind Rule 77(d) would not be served by denying the losing party the privilege of appealing and, in our view, justice demands that the losing party be given that opportunity.

Although several cases in this circuit have held that a motion to vacate and re-enter a judgment under Rule 60(b) cannot be used to extend the time for appeal, the facts in those cases are distinguishable. In *Lord v. Helmandollar*, 348 F.2d 780 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 928 (1966), local counsel received notice of the entry of judgment but out-of-state counsel did not. The negligence of local counsel and not the failure of the clerk or the court resulted in the failure to timely appeal. In *Hodgson v. United Mine Workers*, 473 F.2d 118, 124, 125 (D.C. Cir. 1972), appellant moved to vacate the judgment under Rule 60(b) even though he could have sought a thirty-day extension of time to appeal. Fed. R. App. P. 4(a). In each case counsel

knew of the entry of judgment in time to perfect an appeal under the Rules.¹

We believe that a trial court may vacate and re-enter a judgment under Rule 60(b) to allow a timely appeal when neither party had actual notice of the entry of judgment, when the winning party is not prejudiced by the appeal, and when the losing party moves to vacate the judgment within a reasonable time after he learns of its entry. *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir. 1970); 6A Moore's Federal Practice ¶ 60.03[9] (2nd ed. 1971). A reasonable time might be judged by the thirty-day period in which a party must file a notice of appeal under Rule 4(a) of the Federal Rules of Appellate Procedure.

The order of the district court denying appellants' motion to vacate is reversed.

¹ In *Weedon v. Gaden*, 419 F.2d 303 (D.C. Cir. 1969), appellant moved on September 12, 1967, to vacate a default judgment entered seven years earlier. This motion was denied on November 17, 1967, but none of the parties received notice of the order denying the motion. On January 19, 1968, appellant learned of the order. He filed a motion to vacate on January 24. The motion was denied on February 13. On March 18, he filed a notice of appeal from the order of February 13. He did not seek a thirty-day extension of time within which to appeal. Fed. R. Civ. P. 73(a) (1968); see Fed. R. App. P. 4(a). Since the notice of appeal was filed more than thirty days after the entry of the order from which the appeal was taken, this court did not have jurisdiction over the appeal. *Randolph v. Randolph*, 198 F.2d 956 (D.C. Cir. 1952). The comments on the use of Rule 60(b) to preserve the right to appeal are therefore dicta.